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E S S A Y S

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I. The Law of Evidence.

II. New Trials.

III. Special Verdicts.

IV. Trials at Bar.

A N D

V. Repleaders.

IN THREE VOLUMES.

By JOHN MORGAN,
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V O L. II.

CONTAINING The first VIII. Divisions of the II^d. Essay.

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A faculty for a <i>pew</i> in a church, to a man and his heirs, is bad	-	-	c. 235, <i>Ec.</i>
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Forfeiture.

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E S S A Y II.

Of New Trials.

INTRODUCTION.

THE causes of *suspending* judgment, after Bl. Com. I. iii. c. 24 a verdict given, by granting a *new trial*, are at present wholly *extrinsic*, arising from a matter foreign to or *dehors* the record. They are in general,

- I. Misbehaviour of a party towards the jury.
- II. A verdict obtained by fraud, stratagem, or unequitable means.
- III. Gross misbehaviour of the jury.
- IV. A verdict contrary to evidence, or an hard action, &c.
- V. A verdict against the record, or against law.
- VI. For excessive damages.
- VII. For insufficient damages.
- VIII. For refusing evidence by, or misdirection or nondirection of the judge.
- IX. And other causes, as irregularity, &c.

For these, and other reasons of the like kind, it is the practice of the court to award a *new*,
VOL. II. B or

6 Mod. 22.
Salk. 649.
* But sometimes
hath been, as
may be seen
hereafter.

or second *trial*. But if two juries agree in the same or a similar verdict, a third trial is *seldom* * awarded: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

Vide Tyndal and
others v. Brown.
B. R. 1786, 7.
Post V.

Yet this is sometimes done, where matter of *law* is blended with the question of *fact*, and it clearly appears to the court, that the jury have mistaken the law.

The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehaviour in juries, is of a date extremely antient.

24 Ed. III. 24.
Bro. ab. t. ver-
dite 17. 11 Hen.
IV. 18. Bro. ab.
t. enquest 75.
14 Hen. VII. 1.
Bro. ab. t. verdite
18. Vide Post.

There are instances in the year books of the reigns of *Edw. III. Hen. IV. and Hen. VII.* of judgment's being stayed, (even after trials at bar,) and new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn. And upon these Chief justice *Glynn*, in 1655, grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury: apprehending, with reason, that notorious partiality in the jurors, was a principal species of misbehaviour.

Styl. 466. Vide
Post.

Styl. 138.

A few years before, a practice took rise in the common-pleas, of granting new trials upon the mere certificate of the judge, (unfortified by any report of the evidence,) that the verdict had passed against his opinion; though Chief justice *Rolle* (who allowed of new trials, in cases of misbehaviour, surprise, or fraud; or if the verdict was notoriously

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contrary to evidence) refused to adopt that practice in the king's-bench.

¹ Sid. 235. Styl. pract. Reg. 310, 311. edit. 1657.

At that time it was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised to the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record.

Cro. El. 616, Palm. 325. ¹ Brownl. 207.

But very early in the reign of *Charles II.* new trials were granted upon *affidavits*; and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity, to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.

¹ Sid. 235. ² Lev. 140.

Formerly the only remedy, for reversal of a verdict unduly given, was by writ of *attaint*, and which is, at least, as old as the institution of the grand assise by *Hen. II.* * in lieu of the *Norman* trial by battel.

¹ Burr. 395.

Such a sanction was probably thought necessary, when, instead of appealing to Providence for the decision of a dubious right, it was referred to the oath of fallible, or, perhaps, corrupted men. Our ancestors saw, that a jury might give an erroneous verdict; and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy which they provided, shews the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in our courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that,

* *Ipfi regali institutioni elegantius inserta.* (Glanv. l. ii. c. 19.)

if they found a wrong verdict, they must be wilfully and corruptly perjured, whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great searcher of hearts: and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive, from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this, laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury, the condition of his redress.

The judges saw this; and very early, even for the misbehaviour of jurymen, instead of prosecuting the writ of *attaint*, awarded a second trial: and subsequent resolutions, for more than a century past, have so extended the benefit of this remedy, that the *attaint* is now as obsolete as the trial by battel which it succeeded: and we shall probably see the revival of the one, as soon as the revival of the other.

• Vide Bl. Com.
l. iii. c. 17.

And here we may admire * the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by degrees, from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence from the courts of common law, to be decided according to the forms of the imperial law; upon depositions in writing; which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial

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mercial property, come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilties of law. Either party may be surprised by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: he may not be able so to state and range the evidence as to lay it clearly before them; nor to take off the impressions which have been artfully made on their minds by learned and experienced advocates. The jury are to give their opinion *instantly*; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men, may bring in a verdict, which they themselves, upon cool deliberation, would wish to reverse.

Next to doing right, the great object, in the administration of public justice, should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of the party's counsel, or even in the opinion of by-standers, no person would go away satisfied, unless he had a prospect of having it reviewed. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury, without a possibility of redress.

Granting a new trial, under proper regulations, cures all these inconveniences, and at

the same time preserves intire and renders perfect, that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, doth not impute any blame to the former jury; who, had they possessed the same lights and advantages, would probably have been of a different opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

A sufficient ground must however be laid before the court, to satisfy them that it is necessary, for the sake of justice, that the cause should be farther considered. If the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*: if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large, why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are, upon full deliberation, clearly explained and settled.

Nor do the courts lend too easy an ear to every application for a review of the former verdict.

verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the truth and justice of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that, which leans against the former verdict, ought always very strongly to preponderate.

In granting such farther trial, (which is matter of sound discretion,) the court hath also an opportunity, which it seldom fails to improve, of supplying several defects * in this mode of trial, by laying the party applying under all such equitable terms, as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admission of others, not intended to be litigated; the production of books, deeds, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expence of this proceeding are so small and trifling, that it seldom can be moved for to gain time, or gratify humour. If the cause is tried in term time, it must be moved for in four days; if tried in the vacation, within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself,

* V. 3 Bl. Com.
l. iii. c. 23.

even in the very mode of its revision. In every country of *Europe*, and in those of our own tribunals which conform themselves to the process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day, and from court to court, upon questions merely of fact; which is a perpetual course of obstinate chicane, delay, and expensive litigation *. With us no new trial is allowed, unless there be a manifest mistake, and the subject matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of *attaint* after judgment; in the course of the trial he may *demur* to the evidence, or tender a *bill of exceptions*. And, if the first is totally laid aside, and the other two very seldom put in practice, it is, because long experience hath shewn, that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel, or attornies, or even of the judge or jury.

Bl. Com. l. iv.
c. 27.

IN CRIMINAL CASES which touch life or member, the jury must give an *open* verdict, which may be either general, guilty, or not guilty; or special, setting forth all the circum-

Bl. Com. l. iii.
c. 24. p. 392. n.

* Not many years ago, an appeal was brought to the House of Lords from the Court of Session in *Scotland*, in a case between *Napier* and *Macfarlane*. It was instituted in *March* 1745; and, (after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceedings would admit,) was finally determined in *April* 1749: the question being only as to the property of an *Ox*, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of *King's-Bench* or *Common-Pleas*, have lasted a tenth of the time, or have cost a twentieth part of the expence.

stances

stances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all.

This is where they *doubt* the matter of law, and therefore *chuse* to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished and the verdict be set aside by *attaint* at the suit of the king; but not at the suit of the prisoner. But ^{2 Hal. P. C. 310.} the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal; and is treated as such by Sir Thomas Smith, two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of *England*;" for, as ^{2 Hal. P. C. 315.} Sir Matthew Hale well observes, it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions:—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless.

Yet in many instances, where contrary to ^{1 Lev. 9. T. Jones 163. St. Tr. X. 416.} evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for, in such case, it cannot be set right by *attaint*.

Mr. J. Blackstone citing the authority in the ^{2 Hawk. P. C. 442.} margin says, there hath yet been no instance

of

of granting a new trial, where the prisoner was *acquitted*. And it is right, upon all the grounds of which Mr. J. *Blackstone* has treated. —But in a case of misdemeanor, where the defendant hath the making up the record, and consequently giving notice of trial; there it ought to be otherwise, if the prosecutor is surpris'd; as, where a person very lately indicted for *perjury*, was acquitted: a new trial was moved for, and on behalf of the prosecution, it was insisted, proper notice of trial had not been given. The court entertained the motion, and the defendant finding the point could not easily be cleared up, to the satisfaction of the court, consented to a new trial, and was a second time acquitted; but had he not consented, I doubt not but the court would have granted a new trial, if not fully convinced the notice was not proper; and this gives me an opportunity of saying, I think in such a case as that of perjury, it is very absurd, to permit the defendant to make up the record for trial; for though the effects of gross misconduct may be remedied, yet it may be attended with such trouble and expence, as to render the remedy worse, if possible, than the disease: besides, few have property sufficient, and probably fewer have inclination, to make the attempt, and persevere in it. Why therefore, not pursue the same mode, as in the case of felonies? An additional reason may be assigned, in every case of misdemeanor, where a defendant is compelled to make up the record: if he is innocent, it is punishing him before trial, without the least pretence, contrary to the first principles of justice and equity.

We now proceed to the particular heads, stated in the first page.

I. Misbehaviour of a Party towards the Jury, &c.

Vide III. Goodman v. Cotherington.

The plaintiff in *assise* delivered an *escrow* to one of the jury empanelled, as evidence on his part, and afterwards the same juror (with others) was sworn, and they were put into an house to agree upon their verdict: the juror first mentioned, shewed the *escrow* to his companions, and the officer, who kept the *enquest*, mentioned this matter to the court; upon which the justices took the *escrow* from the jurors, and received their verdict, and enquiry was made of the jurors, as to the time of the delivery of the *escrow*, and it was found *ut supra*, and because the verdict passed for the plaintiff, he now prayed his judgment. *Gasc. and Hulls* said, that the jury after they are sworn, ought not to have seen or taken with them any other evidence, but what was delivered to them by the court, and by the party produced in court upon the evidence given; and inasmuch as they had done contrary, it was suspicious, and therefore the plaintiff ought not to have judgment. And afterwards the plaintiff said that the *escrow* was proved in evidence, and that he gave it to them at the bar; therefore he had not done so ill, as if it had not appeared in evidence, *sed non allocatur, &c.*

M. 11 H. IV.
17, 18. Bro. Ab.
tit. Enquest, 75.
Cause of staying
judgment after
verdict.
Fitzh. tit. En-
quest, 37.
Plaintiff delivers
an escrow to one
of the jurors.

The

Metcalf v. Deane, T.
32 Eliz. B. R.
Cro. Eliz. 189.
One of the witnesses examined by the jury after they went from the bar.

The jury being gone from the bar to confer of their verdict, one of the witnesses that was before sworn on the part of *Deane*, was called by the jurors; and he recited again his evidence to them, and after they gave their verdict for *D.* And complaint being made to the judge of the assises of this misdemeanor, he examined the enquest, who confessed all the matter, adding that the evidence was the same in effect, that was given before *et non alia nec diversa*, and this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire fac' de novo* was awarded, v. 35 H. 6. *examination* 17. 11 H. 4. 17. and *Brownlow* cited a precedent *inter Leming and Kempe* accordingly. *Vide the next case.*

Heyler v. Hall,
M. 20 Jac. B.
R. Palmer 325.
Evidence given after the direction of the court to the jury.
Bankrupt.

In *ejectment*, the parties were at issue as to the day one *Pratt* became *bankrupt*; and it was agreed,

1. That if one *keep* within his house for a long time, this does not immediately make him *bankrupt*; but if he *conceal* himself in his house for a day, or for an hour, to delay or defraud his creditors, this makes him a *bankrupt* within the statute.

2. It was agreed that if one be surety for another and conceal himself, he is a *bankrupt* within the statute.

3. It was agreed, that if one exercise trade, and then becomes indebted, and after quits his trade, and lives in the country without any trade, but upon his lands, and *conceals* himself from his creditors, yet he is a *bankrupt*, because he lived by his trade, when the debt accrued.

4. It was agreed that if one for a time carry on-trade, as *Pratt* did, who was a *felt-maker*,

and after he quit his trade, but leaves his stock in the hands of another, and the former receive part of the profits of the other, and is also partaker of the loss, if after such quitting trade he becomes in debt and conceals himself from his creditors, that he shall be said to be a *bankrupt* within the statute; and all this was agreed, upon giving evidence to the jury in *B. R.* and after evidence given, and the direction of the court, the plaintiff's solicitor delivered to the jury, in the face of the court (but this was not observed) as they were departing from the bar, the depositions of *Pratt* taken in *Chancery*, which by his own confession proved him a *bankrupt* at the time pretended by the plaintiff; (but these depositions had before been read unto them in court;) they afterwards returned, and were ready to give a verdict for the plaintiff; but the other party by his counsel shewed this to the court, and the jury were examined each of them upon oath, if more was read to them after their departure, than was read to them in open court; and they agreed, that there was not. 2. They were asked, how they were inclined to give their verdict, before they read the depositions; and some said, that they were inclined to find for one, and others, for the other; and upon this the solicitor was committed for his misdemeanor, and the verdict taken *de bene esse*; and the officer of the court was commanded to make a record of all this matter after the verdict.

Evidence after
the direction of
the court.

But it was moved by serjeant *Hitcham*, that it was not necessary to make a record of this, because in the same court, and all that is done in the same court, is in the breast of the justices during this term; otherwise if such matter

matter happen at *nisi prius*, there the justices ought to certify it of record upon the *postea*, at the day in bank. But the whole court against him, that a record ought to be made of it in this court also; and they would not dispute the law upon the point, until it was recorded; because the verdict is of record for the plaintiff, and that ought to be matter of record, which should vitiate it; and afterwards *Hitcham* argued, that the verdict ought to be quashed, evidence having been received after the direction of the court to the jury; and for this he cited 35 *H. VI. examination* 17. 11 *H. IV.* 17 *et* 78. as where they eat and drink, 14 *H. VII.* and for this he relied upon the case of one *Metcalf*, T. 31 and 32 *Eliz.* in *B. C.* where the jury after their departure from the bar sent for a witness, who had before been examined in court, and examined him, who gave the *same* testimony, and no more than he had done in open court before; and for this reason *Anderson Chief Justice of B. C.* was of opinion, that such examination did not vitiate the verdict; but against his opinion it was adjudged by the three other justices, that the verdict should be quashed for two causes. 1. Because the jurors might not think of the answers, which counsel on the other part would apply to this evidence, if it had been again given in court. 2. Because perhaps upon this the court would have given another direction; and all this being returned upon the *postea*, the record saith, that *licet easdem evidencias dedit*, the verdict was quashed, and a *venire facias de novo* awarded; and according to the case of *Metcalf* it was said, that the same matter was adjudged afterwards in

Vide ante.

in *C. B.* Also *Pas.* 34 *Eliz.* between *Flemings* and *Webb*.

On a motion for a new trial, it was held, that desiring a juror to appear in his cause, which was between a miller and a baker, was no ground to set aside the verdict. And the court remembered the case of the duke of *Leeds*, who wrote a letter to a juror, desiring him to attend, and you will oblige your humble servant *Leeds*; which was thought no reason to set the verdict aside.

Snell v. Tim-
brell, M. 12 G. I.
1 Stra. 643.
Labouring a ju-
ror.

II. A Verdict obtained by Fraud, Stratagem, or unequitable Means.

Anderfon v. George, E.
30 G. II. B. R.
1 Burr. 352.
 Action for goods sold; verdict for plaintiff, who had taken a note upon H. and indulged him with time for payment.

Upon a rule for the plaintiff to shew cause " why a verdict obtained by him for 16l. should not be set aside, and a new trial ordered, upon payment of costs,"

The case appeared to be, that the plaintiff had sold goods to the defendant, who paid for them by a promissory note of one *Hopley*, which the defendant indorsed. The plaintiff demanded the money of *Hopley*, but indulged him with farther day of payment several times, till *Hopley* broke.

The only dispute between the two parties was, " which of them ought to bear the loss of this note." For the plaintiff was paid, if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to *Hopley*.

There were *two counts* in the declaration: one, for *goods sold*, the other, against the defendant as indorser of the promissory note.

When the cause came on to be tried, though both parties came to try the *real merits* of the question between them, viz. " which should bear the loss of the note, occasioned by *Hopley's* failure;" and the plaintiff's agents had the note in court; yet finding upon their own evidence, " that the plaintiff had given repeatedly further credit to *Hopley*," they resorted

resorted to a TRICK, and rested their case upon proving the sale and delivery of the goods, which was never disputed. The defendant could not produce the note: it was in the plaintiff's custody. Relying upon it's being the only ground of the plaintiff's case, the defendant had not given him NOTICE "to produce it." The court, stating it, could not be given in evidence: and the defendant had not intitled himself to prove the contents, for want of notice to produce it. LORD MANSFIELD told them, at the trial, it was an improper artifice; that no verdict could stand, which was so obtained. But the plaintiff refused to produce the note, and had a verdict, of course.

It was now contended, for the plaintiff, that the verdict was *regular*, and the plaintiff in *no fault*: for, without notice, he was *not obliged to produce* the note. Therefore the verdict ought not to be set aside.

The court thought the plaintiff had taken an *unfair* advantage, *contrary to justice and good conscience*. That the rules of practice must be *general*: but he who abused them in a particular case, should not shelter a *trick*, by *regularity*. The plaintiff did not want notice to produce a note he *had in court*, and which he had laid in the declaration as his *ground of action*.

Besides, he took a verdict for the price of the goods, *though* he had *received satisfaction*, the evidence of which was in his own custody and *suppressed*.

They not only set aside the verdict, but set it aside *WITHOUT payment of costs*: and declared, "the next time that a party should obtain a verdict in like manner, by an *un-*

“ *fair, unconscionable* advantage, without trying
 “ the real question, they would set aside the
 “ verdict, and make *him pay the costs.*”

A new trial being ordered, this cause was
 tried at *Guildball*, the sittings after this term;
 and the *defendant* had a verdict upon the *merits*,
 to the satisfaction of every body; the case
 being clear, beyond a doubt.

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III. Gross Misbehaviour of the Jury, &c.

Vide Post vi. *Ash v. Lady Ash*; *et ix.* (12.)

(a.) *The King v. Lord Fitzwater.*

Nisi prius in replevin in Essex.

The jury were sworn and committed to the care of the sheriff, and when the justices would have taken the verdict, certain persons deposed, that victuals and drink were brought to the jurors, after their charge, and that they were suffered to go out, for which reason the justices refused to take their verdict, because it was suspicious; and complaint was made of this to the king, by bill, which he indorsed to the justices of *Banco Regis*, to do right and reason; and the under-sheriff by his servant, confessed that he permitted them to go at large, and because this appeared of record, *ss.* his misdemeanor, and he was an officer, a *capias* was awarded against him: and because their going at large, and victuals and drink being carried to them, was only a surmise, a *venire facias* was awarded against the jury, and the trespassers, and between the parties a *venire facias de novo* was awarded.

In the common bench, the jury charged, found for the plaintiff, and the defendant prayed a *venire facias de novo*, because the jury had taken victuals and drink, between their charge, and the verdict given: and the

Bro. ab. tit.
verdt. 17. 24
Ed. III. 24.

Victuals and drink brought to the jurors after their charge, and they were suffered to go out. As to the jurors eating and drinking, vide post IX. (18)

Bro. ab. tit.
verdt. 18. 14 H.
VII. 1.

Jury eating and drinking between charge and verdict.

verdict was adjudged *void*, and a new *venire* awarded.

Goodman v. Cotherington, M. 16 Car. II. B. R. 1 Sid. 235. 1 K. 824. Litt. Rep. 69. 2 Ro. 715. pl. 16. Stiles 383. Co. Lit. 227. Palm. 326. Mo. 452. Where the miscarriage of jurors shall avoid the verdict. One of the jury went from his companions, and then returned, brought a court-roll with him, and said he knew the matter, and was for the plaintiff, and the rest of the jury submitted, tho' before of a contrary opinion.

How the court takes notice of it.

Hall v. Vaughan H. 37 Eliz. rot. 21. Mo. 599. No. 825. Jury eating and drinking at their own charge, after charge, and before verdict.

M. 2 Eliz. Mo. 17. No. 63.

A new trial was moved for upon several affidavits that at the last *Gloucester* assises the jury being charged with an issue concerning a copyhold, after they had heard the evidence, and when they had departed from the bar, one of them went from his companions and then returned to them, and brought a court-roll with him, and said that he knew the matter and was for the plaintiff; and then, altho' the rest of the jurors thought otherwise before, they submitted to this juror, and found for the plaintiff: and the court, for this misbehaviour, awarded a new trial. And in Lord *Sbande's* case, in the time of *Roll*, chief justice, after a *trial at bar*, a new trial was granted, because the plaintiff had delivered a paper to the jurors, after they departed from the bar.

But *Twisden* justice said that in case of such misbehaviour *in pais*, no notice should be taken of it upon affidavits, unless it was indorsed upon the *postea*, and so it is held in *Cro.* 3. 189. pl. 17. 411. 626. *Vide Introd.*

The jurors eat and drank at their *own* costs before verdict, and after their departure from the bar. And this was certified upon the *postea*, yet the verdict was held not to be void, but that the jurors were fineable. It seems otherwise if at the costs of either of the parties.

Nota per all the justices, that after a verdict given, a man shall never say in arrest of judgment, that the jurors have had victuals and drink between their departure from the bar, and the giving of their verdict; but it ought to be alledged before the verdict is given.

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In alledged panio given no ca been other Er in a first in wheth jurors confer jurors writin dence a verd An murre bar, t error, doth n the jur behalf that h a piec before his fel witness might therefo H. VI that, i it had concei examin cannot

In arrest of judgment after verdict, it was alledged that a juror delivered to his companions an *escrow* for evidence, which was not given in evidence at the trial, and adjudged no cause to arrest the judgment, unless it had been received from one of the parties, or the other, which did not appear.

Error of a judgment in the common-bench, in a *formedon*. The errors assigned were: the first in *fact*; that the parties being at issue, whether a feoffment were made, &c. and the jurors at *nisi prius*, being gone together to confer, &c. *William Malevory*, one of the jurors, shewed to the other jurors an *escrow* in writing, *pro petentibus quod non fuit dat.* in evidence *per partes prædictas, per quod*, they found a verdict for the demandant.

And, upon this error assigned, it was demurred in law. And, after argument at the bar, the court resolved, that it was not any error, nor could be alledged for error: for it doth not appear, that it was evidence given to the juror by any of the parties, or by any other in behalf of the plaintiff; but it shall be intended, that he shewed it of himself; and, that it was a piece of evidence, which he had about him before, and shewed it to inform himself and his fellows; and, as he might declare it as a witness, that he knew it to be true; so he might shew any thing which he knew: and therefore it is not like to 11 *H. IV.* 33. and 35 *H. VI.* Title *Examination*. They also held, that, if this were cause to avoid a verdict, if it had been so found by examination, as they conceived it was not, yet in regard it was not examined, nor made parcel of the record, it cannot be assigned for error. For *Pepkam*

Drove v. Short,
H. 40 Eliz. rot.
733. Mo. 546.
No. 728.
A juror delivers
an *escrow* to his
companions, not
given in evi-
dence.

Graves v. Short,
M. 40, 41 Eliz.
H. 40 Eliz. rot.
847. Cro. Eliz.
616.

Error in fact, one
of the jurors
delivering an
escrow to his
companions, not
given in evi-
dence.

said, the trial hereof rests only in the examination, and it shall not be *per pais*, as *non-age* shall be by *inspection*, to avoid a fine; so this matter should, to avoid the verdict; for, if so, then every verdict upon such a surmise, might be drawn in question, and peradventure, after the parties are dead, and all the jurors dead, so as they cannot be examined, which would be a great inconvenience. And therefore they held that such a cause of staying the judgment ought to be always, if it be upon verdict at *nisi prius*, upon the *postea* returned: and, if it be upon verdict in *banco*, it ought to be made parcel of the record; otherwise the party shall not take advantage of staying the judgment or of assigning it for error.

Another error was assigned *ore tenus*, that the record is, *ad quem diem, scilicet Octob. Trinitatis 39. præceptum est, quod habeat corpora Juratorum coram Justiciariis in Banco in Crastino Animarum, nisi Justiciarii in partes illas venerint Octavo Julii proxime præterito*, where it ought to have been *proxime sequente*. *Sed non allocatur*: for it was said, that all the precedents are so, in the common-bench, to make their entries as of the time past: but otherwise it is in this court. Wherefore the judgment was affirmed.

Afterwards, at another day, it was moved to have costs allowed, and damages for the delay of execution, upon the statute of 3 *H. VII. cap. 10.* whereupon it was doubted, because it was in a *formedon*, in which (being the principal action) no costs were allowable. But, notwithstanding, upon consideration of the statute, for that the statute is general, *that, if a writ of error be brought before execution, and*

in delay of the execution, and the judgment be afterwards affirmed, that the demandant, or plaintiff, shall have costs, and damages; and it mentions not any action: they all resolved, that costs and damages should be given for delay of execution, although in the first action no damages were recoverable: wherefore it was adjudged accordingly.

Appeal of murder for the death of plaintiff's husband. The defendant pleaded *not guilty*; and upon evidence at the bar it appeared, that two days before her husband's death, he, and the defendant fighting upon a quarrel then between them, the defendant was hurt in that fray; and the third day after the plaintiff's husband, passing by the defendant's shop, the defendant pursued him suddenly, and the husband's back being towards him, so that he did not perceive him, the defendant struck him upon the calf of his leg, whereof he instantly died. The defendant to excuse himself, affirmed, that he who was slain, when he came by his shop, smiled upon him, and wryed his mouth at him; and therefore, for this mocking of him, he pursued him. And it was much inforced by the defendant's counsel, that it was a new cause of quarrel, and so the stroke is not upon any precedent malice, and therefore not murder. But all the court severally delivered their opinions, that if one make a wry, or distorted mouth, or the like countenance upon another, and the other immediately pursues, and kills him, it is murder: for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground, or pretence, for a quarrel; and so delivered the law

Watts v. Brains,
M. 42 Eliz.
Cro. Eliz. 778.
Vide Co. Ent.
59. a. &c.
Vide also Cro.
Eliz. 695.
Appeal of murder, malice pre-
sente. The
parties had
quarrelled three
days before.

to the jury, that it was murder, although what the defendant pretended had been true. Whereupon the jury going from the bar, notwithstanding the evidence was pregnant against the defendant, eight of them agreed to find him *not guilty*: but the other four withstood them, and would find it murder: and on the next morning, two of the four agreed with the eight, to find him *not guilty*: and afterwards the other two consented in this manner, that they should bring in and offer their verdict *not guilty*; and if the court disliked thereof, that then they all should change the verdict and find him *guilty*: and upon this agreement they came to the bar, and the foreman pronounced the verdict, that the defendant was *not guilty*: and the court much misliking thereof, being contrary to their direction, examined every one of them by the *poll*, whether that was his verdict: and ten of the first part of the pannel, severally, affirmed their verdict, that the defendant was *not guilty*: but the two last affirmed, how they agreed, and discovered the whole manner of their agreement: whereupon, they were sent back again, and returned, and found the defendant *guilty*. And for this practice *Harris*, the foreman, was afterwards fined 100 marks, and the other seven who agreed with him at the first, every of them was fined 40 l. and the other two, who agreed with the eight, although they affirmed, that it was, because they could not endure, or hold out any longer; yet, for that they did not discover the practice, being examined by *poll*, but affirmed the verdict, were fined each of them at 20 l. and all of them imprisoned: but the other two were dismissed, yet blamed for such a manner of consenting

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sentencing in abuse of the court. And afterwards the defendant was adjudged to be hanged.

The court denied to grant a new trial, upon affidavit that the jury went by votes; tho' Serjeant *Stroud* said it had been granted in the like case.

P. 2 Jac. II. B. R. Comb. 14.

A new trial was moved for upon affidavit, that the jury took an act of common-council out with them, and that printed libels were spread against the defendant, and it was denied: for as to the first it differs from the *Lady Ives's* case, where they took a map of one side, which was evidence on neither side: but this was an act of neither side, and evidence on both; but admitted to be irregular. *Et per Holt, C. J.* So if a jury eat at their own charge, 'tis fineable, but that verdict shall stand; otherwise if at the charge of one of the parties, and the verdict is found for him. *Vide Mo. 599.*

King v. Burdett
M. 8 W. III.
B. R. Salk. 645.
Jury after going
from the bar sent
for an act of
common council
given in evi-
dence, and new
trial denied.

A new trial was granted upon affidavit, that the foreman declared the plaintiff should never have a verdict, whatever witnesses he produced.

Dent v. Hundred
of Hertford, M.
8 W. III. B. R.
Sal. 645. See
Farell. 31, and
37.

In an action brought against an officer, for a seizure *absque probabili causa*, a new trial was granted, because the jury threw up crofs or pile, whether they should give the plaintiff three hundred pounds or five hundred pounds damages, and the chance for five hundred pounds came up. And *note*, the court now made a rule, that *Middlesex* juries at *nisi prius* shall be paid in court.

Mellish v. Arnold, M. 1719.
Eunb. 51.
New trial granted
for misbehaviour of the
jury.

Nota, The affidavits moved upon were made by persons who heard the jurymen talk of the matter; and the jurymen did not think fit to make any affidavit to clear themselves; so a new trial was granted.

The Queen v.
the Bailiffs and
Burgesses of
Bewdley, in com.
Worcester. M.
1712. B. R.
1 P. Wms. 207.
Scire facias to
repeal a charter.

A writ of *scire facias* issued out of the petty bag, in chancery, to repeal the charter granted to this borough *septimo Annæ Regin'*. Whereupon issue being joined, and the record transmitted into the crown-office of the queen's-bench, in *Trinity* term *undecimo Annæ*, the cause was tried at the bar of that court.

The points in issue were,

Vide the points
opposite.

1st. Whether one *Thomas Smith* was duly elected bailiff on the 25th of *September, 1707*?

2dly. Whether there were a bailiff and burgesses (*i. e.* a corporation) in being at the time of granting this charter?

3dly. Whether that corporation refused this charter?

The case upon evidence, not being given by Mr. *Williams*, cannot be stated here, nor is it necessary: the two former were the principal questions; and the proof upon them was in short this:

As to the first point, it appeared, that by the charter of *Jac. I.* all the burgesses (as well common, as capital,) had a right of voting in the election of a bailiff, and that a bailiff might be chosen out of the burgesses.

That *Smith* was a common burgess under that charter, and that he was elected after the invalidity of king *James II.*'s charter was publicly known and acknowledged; and that the common burgesses qualified under the old charter were then admitted to vote, (which had not been done from the time of accepting king *James II.*'s charter, to that day,) and that *Smith* had the majority of those burgesses; but it appeared, that one *Coldwell*, the bailiff for the time being, who presided at this election, and took the poll, was in by virtue of the
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void charter, and that he was never so much as a common burges under the old charter.

That he acted with fourteen capital burgeses, which is the number appointed by the void charter, and that the burgeses qualified by that charter were called, and voted promiscuously with those qualified by the old.

2dly. As to the second point, it appeared, that by the charter of king *James I.* the bailiff and capital burgeses were to do all corporate acts, and were originally to chuse in the common burgeses.

That upon the death or vacancy of any of the capital burgeses, the charter appoints that *residuum capital' burgens' vel major pars eorund'*, shall chuse in others within fifteen days after such vacancy; that they had neglected to fill up vacancies for these twenty-two years last past, and that at the time of granting the charter of her present majesty, there was only one capital burges in being (*viz.* one *Slade*), qualified under the charter of king *James I.*

Upon this evidence several questions in law arose.

1st. As to *Smith's* election, whether that must not be taken to be one intire act, done under the direction of the illegal bailiff, by virtue of the charter of king *James II.* and consequently void; the old burgeses having submitted to be called by that bailiff, and voted promiscuously with the others, without distinction?

2dly. Whether, according to the charter of king *James I.* the capital burgeses were not to be taken to be extinct, there being but one remaining?

3dly. The capital burgeses being an integral part of the body, by the old charter,

whether the corporation could subsist without them, or must, in defect of them, be dissolved?

After some debate at the bar, the counsel for the defendants prayed a special verdict, and the chief justice, in summing up the evidence, directed the jury to reserve these points; for that they were of too great moment to be determined without consideration; but some disputes arising thereupon among the judges, *Parker*, chief justice, said, that the election of *Smith* to be bailiff seemed to him to be made under the void charter, and that it could not be under any other; that *Coldwell* was bailiff under that charter, and all the voters submitted to his authority, which the old burghesses ought not to have done, but to have insisted upon their ancient right, and opposed the others joining with them; that it was a particular power given by the charter, and, in some degree, like the case of *Wroth v. Wigs*, 4 Rep. 39 *b*, very different from the case of electing members of parliament, (which had been mentioned at the bar) for there they all come under pretence of the same right, and by a proper authority to chuse.

But supposing *Smith* was duly elected, there was no proper officer to swear him in, neither bailiff nor recorder, by the charter of king *James I.* for *Coldwell* was not so much as bailiff *de facto*, but a bailiff of a different corporation, as effectually as if he had been bailiff of another town. To make him a bailiff *de facto*, he must have been in under a right constitution; whereas he was in by a void one, and had no pretence of right by the old charter.

As to the second question his lordship said, he could not think it within the intention of the charter, which appoints the vacancies of the

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the capital burgesſes to be filled up within fifteen days, that twenty-two years ſhould be permitted to elapſe, till theſe were all extinct to one man, and that one to have the power of electing all the reſt.

As to the third, he thought it a queſtion of great moment, whether this corporation could ſubſiſt without capital burgeſſes, they being made neceſſary to all corporate acts?

Powell J. could not think the corporation was diſſolved for want of capital burgeſſes, but doubted whether they could act; that it was not material whether *Coldwell* was a lawful bailiff or not; for that the corporation might, upon their charter-day, chuſe a bailiff, tho' there were none then in being, nor had been for twenty years before; not like the caſe of *Wroth* and *Wigs*, for that was of a judicial authority.

(a) *Eyre J.* thought the third queſtion very conſiderable, (*viz.*) Whether, if a corporation loſes one of its integral parts, it be not diſſolved? *vide 1 Rol. Abr. pag. 514. tit. Corporations*; the caſe of a corporation conſiſting of brothers and ſiſters.

As to the ſecond queſtion he ſaid, that when a corporation laſes the day of chuſing its head, the royal authority muſt interpoſe; and in the *interim*, the operation of it ceaſes. That in this caſe there had not been a regular election of a bailiff for ſeveral years.

That if *Smith* was choſen in execution of the charter of *Jac. II.* tho' at an aſſembly not under that charter, he was in by virtue thereof; that it was held in the caſe of the *Devizes*, that

(a) Note; Mr. Juſtice *Littleton Powis* was abſent all this term, being indiſpoſed with the gout.

a good mayor for the time being, is necessary to the election of another.

Notwithstanding the *court* was so *doubtful* in these points, the *jury* were, however, *very clear* in them; and about three of the clock next morning gave a privy verdict, by which they found all the issues *generally*, for the *queen*, and affirmed it at the bar about ten; and tho' they were sent out again by the court, persisted with great obstinacy.

Hereupon the defendants came and moved that the verdict might be set aside, upon these two points:

Where the jury bring in their verdict contrary to the direction of the court, a new trial may be granted, even after a trial at bar.

1st. For that the jury had found matter of law, and contrary to direction.

2dly, For that the *venire* was wrong awarded, being *de vicineto de Bewdley*, whereas by the 4th and 5th of queen *Anne*, cap. 16. for the amendment of the law, it ought to have been *de corpore comitatûs*.

The court, after advice with the justices of C. B. and barons of the *Exchequer*, gave their opinion upon the first point the same term; and the Lord Chief Justice delivered it as the opinion of all the judges of *England*, (except *Powell*) that when the defendant's counsel pray a special verdict, and the court direct the jury to find one, if the jury will take upon them to go contrary to that direction, and find matter of law, it is a sufficient ground for a new trial, even after a trial at bar.

For that it would be very unreasonable, that in cases where the court and the jury are *both* of opinion against the party, there he should have a remedy by a bill of exceptions; but that in cases where the jury *only* are of opinion against him, and the court doubtful, he should be

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be absolutely concluded, and without remedy, as he must be in this case.

Powell J. contra: I do not very well know upon what foundation of law new trials have been granted; but I found the courts in possession of such a practice as to trials by *nisi prius*; but I do not know that this practice has been established as to trials at bar.

Indeed I do remember two in the exchequer in my time, but I was always of opinion against them, and that for these reasons, because one is a trial at common-law, and the other by special commission only; and because trials at bar are much more solemn, and attended with much greater charge to the parties, than the other.

I do not think any thing ought to be a ground for a new trial, after a trial at bar, but what would make the jury liable to an attain.

Chief Justice: The first case of a new trial, which we find in the books, is that of *Wood and Gunston*, in *Styles*, 462. 466. and that was Vide Post VI. after a trial at bar.

The practice of the courts is the law in these cases; and so of ejectments and rules for paying money into court, which have no other foundation.

In the case of *Bristol v. Cooper* *, a special verdict was prayed and directed, and the jury found generally; whereupon a new trial was granted for that reason.

* I can't find this case reported.

Dowman's case in the 9 *Rep.* is very observable, about the several duties of judges and jurors in this particular.

9 Co. the 1st. case.

In most cases, even where new trials, after trials at bar, have been denied, the judges have asserted the general right, and one reason why we do not find this practice more ancient, may

may be, that there are no old reports of motions.

Eyre J. I do not find the reasons for new trials confined to misdemeanors for which the jury may be fined; the case of *Wood* and *Gunston* was not so.

But if a new trial shall be granted in a case where the jury have done wrong, in a matter which is properly under their cognizance, I cannot see any reason why it may not be done in cases where they take upon them to determine matters not within their cognizance.

*Vide 1 Sid. 153 *.*

The counsel for the queen insisted, that this verdict being set aside for a misbehaviour of the jury, and not any fault in the prosecutor, costs ought to be allowed.

But the court said, there was no need of entering into that question, 'till the matter of the *venire* was determined; and adjourned the consideration of that 'till *Michaelmas* term following, for the advice of the other judges.

Accordingly in *Michaelmas* term (4 Nov.) this point was argued before all the judges of *England*, at *Serjeant's-inn*, in *Fleet-street*.

Serjeant Prat pro def. By the statute of the 4th and 5th of her present majesty for the amendment of the law, this *venire* ought to have been awarded *de corpore comitatûs*.

This is a case within the express words and intention of the act; the words are, "That from and after the first day of *Trinity* term, every *venire facias* in any action or suit in any of the courts at *Westminster*, shall be awarded of the body of the proper county;" and this is a suit in the court of chancery, in order to repeal the letters patent of the 7th of the present queen.

Neither

* This is the case of *Rex v. Fenwick* and *Holt*. *Vide post IX. (12.) (b.)*

Neither is it less within the intention and mischief designed to be prevented, as appears most plainly from the preamble, which recites, "That whereas great delays do frequently happen, by reason of challenges to the array of panels of jurors, and to the polls; for default of hundredors, for prevention thereof, &c." Now this is a proceeding to which that mischief extended; for at the trial there might have been a challenge to the array, for want of hundredors.

That there may be such a challenge in the case of the crown, is what cannot, I think, be denied; for if the sheriff be commanded to return a jury *de vicineto*, and there is not any hundredor upon the panel, he has not obeyed the command of the writ, and the challenge is for his default.

3 *Keb.* 740. In an information for perjury, a motion was made, that the defendant might not challenge for want of hundredors, and it was denied; because the subject would thereby be ousted of a privilege to which he is intitled by law.

The statute of 23 *H. VIII. cap.* 13. enacts, that in trials for murder, in corporations, there shall be no challenge for want of freeholders; by which it appears, that there might be such a challenge at common law, in the case of the crown; and certainly where freeholders are necessary, hundredors are equally so.

This act being made for the advancement of justice, it ought to have the most beneficial and extensive construction imaginable; but to say, that the crown shall not have a jury *de corpore comitatús*, is to deprive it of the benefit and advantage of an act of parliament.

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It is true, that, generally, the crown shall not be ousted of its prerogative by an act of parliament, unless it be expressly mentioned; but that rule cannot affect this case, for here the crown had no prerogative: it was liable to the inconveniences recited in the preamble, as well as the subject, and then surely it ought not to be debarred of a share in the remedy.

The intention of this act may be further collected from the next clause, which plainly proves, that the law-makers took it to extend to cases of the crown; for it expressly excepts all appeals, indictments and prosecutions on penal statutes, and what occasion could there have been for that exception, if the former clause had not taken in any crown cases at all?

But, I think, it deserves to be considered, whether this prosecution be properly a suit of the crown or not? It seems to be no more than a contention between two corporations, whether the letters patent granted to one side, or those granted to the other, shall prevail? Both are contending for a royal charter, and the crown is perfectly indifferent who obtains it; the judgment in this case will be only for the benefit of the party, for here can be no judgment of punishment for the usurpation, as in informations in the nature of *quo warranto's*.

Sir Peter King: The words of this act are as general and comprehensive as possible, "Every *venire facias* for the trial of any issue, "in any action or suit."

That there might be challenges both to the array, and to the polls, in the case of the crown, appears from *Keilw. 102. a.* And this statute is made for the remedy of that mischief

mischief in all cases where it might possibly happen before, some few only being excepted by name. But in the present case, Mr. *Attorney General* is contending for the crown, that it shall not have the benefit of a very useful and advantageous law; this is like a man's disabling himself. *Lit. sect. 410.*

I know no instance in the law, where the crown is excluded out of general statutes made for the benefit and advantage of prosecutors. The cases, wherein the crown is held not to be bound, are, where it would otherwise be debarred of a precedent right or prerogative; but in the case at bar, the crown was before this act in the same condition with the subject; and I hope it will appear, that this is not *placitum coronæ*, but at most a civil action brought in the name of the crown. See Sir *Oliver Butler's* case, 2 *Vent.* 344. 3 *Lev.* 220. In Mr. *Brewster's* (a) case, *Holt, C. J.* said, this was a writ of right. (a) 6 *Mod.* 229.

Though taking it either way, *viz.* as a suit of the crown, or of the subject, this *venire* is wrong, and if so, we are in the only method to take advantage of it: the sheriff has done his duty, and obeyed the command of the writ, and therefore we could not challenge the array, but come to the court to quash it: challenge is for the default of the sheriff, where the writ is right; quashing is for error in the writ itself.

Mr. *Salkeld*: The great objection in this case is, that the act of the 4 and 5 *Annæ* is a statute of *jeofails*, and that therefore this case is not comprehended within it. This act of parliament consists of distinct branches, which are separate laws; some of them are statutes of *jeofails*, and others statutes alterative of the

common law; and the clause, upon which this question arises, is of the latter sort.

Statutes of *jeofails* concern such faults as would vitiate the judgment, and make it erroneous, if given, and are to enable the courts to amend such faults, or to overlook them, and to give judgment notwithstanding.

The clause about *venire's* is not of this nature, but is an intire alteration of the law in this particular, making that to be right now, which was wrong before, & *sic vice versâ*.

Statutes of *jeofails* make no alteration in the law; for the errors they concern, continue so notwithstanding, but only provide a remedy, that they may not prejudice the party.

The chief reason why the statutes of *jeofails* have not been held to extend to the crown is, that such words are used in them, as always exclude the crown, *viz.* plaintiff and defendant, demandant and tenant, &c. otherwise here.

So far as this is a statute of *jeofails*, the crown is not comprehended within it; but so far as it is an act of alteration, the crown is included.

Thus in 36 *Ed. III. cap. 15.* the first clause changes the course of pleading, and by that the king has been always held to be bound; but the second clause, which provides, "That no man shall be prejudiced for want of form in pleading," &c. being a law of *jeofails*, has for that reason been held not to extend to the crown; so of 16 and 17 *Car. II. cap. 8.*

Northey attorney general *pro Regina*: The practice of the Crown-office ever since the making of this act, in all cases of informations, as well in those not excepted, as in those comprised within the *exception*, has been to award the

the *venire de vicineto*, and it was never controverted till now.

And to this purpose I would apply what I have heard my lord *Hale* say on like occasions, "That judges ought to have a great regard to practice, when the matter is not *res integra*; and when things have gone on in that course a great while, without being broken in upon."

As to what has been said, that the words of this act extend to cases of the crown, the 4 *Hen. VI. cap. 3.* has words as general, *viz.* any process or plea, and yet was never taken to extend to the crown. The clause in the statute of (a) frauds, whereby executions are made to bind from the delivery of the writ to the sheriff, has general words, *viz.* every writ of execution, and yet the crown is held not to be bound by them, notwithstanding it had no prerogative in the case before. I wonder to hear this denied to be a suit of the crown, since the same being brought in the name of the crown, (though for the benefit of the party,) makes it the suit of the crown; as in *quo warranto's*, &c.

(a) 29 Car. II.
cap. 3. sect. 16.

In a late case of a *quo warranto* of a claim of fishery in several villis, the *venire* was awarded from one only, and held well enough, because tried by a jury of the proper county; so in the case at bar.

If the resolution in this case should be contrary to the received practice, it would shake all the judgments that have been given upon informations since the making of this act.

Raymond solicitor general: The words in several other clauses in this statute are as general as in this, and yet the crown has been held not to be comprehended within them;

for instance, that about demurrers, and that about pleading double; *Regina v. Foley*, a motion was made for liberty to plead double, and denied, because not within the clause.

The words in some of the former statutes of *jeofails* are as large and comprehensive as here; however they have not been held to extend to the crown: nay, it appears to have been the opinion of the makers of this act, that neither those statutes, nor this of the 4th and 5th of her present majesty, could take in crown-cases; for they have added a clause at the end, to extend this and all the statutes of *jeofails* to suits for recovery of debts owing to the *revenue*, which had been superfluous, if the former clauses had been insufficient.

But if this case be held to be within the 4 and 5 *Annae*, I hope the same reason will bring it within other acts of *jeofails*, which contain words as general and comprehensive, and then it will be helped by 16 and 17 *Car. II. cap. 8.* the cause being tried by a jury of the proper county.

Mr. *Lutwyche*: It is considerable, in this case, who is the person that takes the exception to this process, and how he is prejudiced by it? Why truly the defendant comes and complains, that he has had a greater advantage put in his power than he should have had; that he has had a liberty of challenging given him, which, by law, he ought not to have had.

The principal reason why the statutes of *jeofails* have not been taken to extend to the crown, is, because it is not expressly named; and this reason holds in the act of the 4th and 5th of her present majesty. See the 8th of
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H. VI. and also the late case of the *Queen v. Tutchin* (a.)

(a) Mich.
3 Annæ.

In *Cro. Car.* 311. the *venire facias* was awarded from the town, whereas it ought to have been from the manor; and held ill in a *quo warranto*; and that the statute of 21 *Jac. I.* did not extend to it; notwithstanding that had an exception of some other crown cases, as in this act.

The clause about pleading double is general, and uses the word [defendant] which is proper for all suits, and yet held not to extend to the crown.

It is no objection to say, that this is a suit for the benefit of the party; for so are informations in the nature of a *quo warranto*; but that this is properly a suit of the crown, appears, in that the attorney general replies, and the proceedings are in the crown-office; for, if it were not *placitum corone*, it should have come on the *civil* side.

But if this act be taken to extend to the case at bar, there can be no reason why it should not likewise be within the 16 and 17 *Car. II.* and it will be no objection to say, that this arises upon a subsequent act, for that statute has always received a very large construction, and been extended even to (a) local actions tried in wrong counties.

(a) Sed quære,

Serj. *Pratt* in his reply for the defendants: *Regina v. Foley*, was an information in the nature of a *quo warranto*, which is a criminal proceeding, and besides, the resolution was upon the clause about pleading double, which is not general; for though it uses the word [defendant] which is a general term, yet it is restrained there by other words, *viz.* tenant and plaintiff in replevin.

The case of *Tutchin* was upon a meer statute of *jeofails*; this is an intire alteration of the law.

The clause, which extends this, and all the statutes of *jeofails*, to cases of the crown, mentions only suits for the recovery of any debt, and therefore cannot affect the present question; and certainly if there be no provision for that purpose, it is impossible that those other statutes should extend to this cause, because it arises upon a subsequent statute which has made a perfect alteration of the law in this point.

Sir *Peter King*: As to the pleading double, see *Poph. 144.* The words of the statute of frauds cannot possibly extend to the crown; for they are, "every writ of *fieri facias*, or "other writ of execution," and *fieri facias* being first named, the subsequent words can only mean *mesne* executions at the suit of the party.

Mr. *Salkeld*: The 8th *Hen. VI. cap. 12.* is grafted on the former statute of *Hen. V.* and expressly tied down to it, so that no general words can carry it any further. Nothing can be inferred from any resolution upon the preceding clauses of this statute; for the very words of them exclude the crown, *viz.* 1st, Party demurring. 2dly, Plaintiff or demandant appearing by warrant of attorney. 3dly, Defendant or plaintiff in replevin.

After consideration, all the justices and barons were unanimous, and the lord chief justice delivered their opinion in court the same term.

In prosecutions of the crown, though since the late statute of the 4th and 5th of queen Anne the *venire facias*, which was awarded de vicineto, and not de corpore com', held good.

Parker, C. J.—We are all of opinion, though this clause might have extended to causes of the crown, had the objection come earlier, yet the constant practice, ever since the making of the act, having been otherwise, and all the precedents both in the Crown-office,

fice,

fice, and in the Exchequer, (in cases not expressly excepted,) being *de vicineto*; to make a contrary resolution in this case, would be, in some measure, to overturn the justice of the nation for several years past; besides, we considered that it is matter of no great consequence; since it only gives the defendant a privilege of challenge, which otherwise he would not have.

It is a rule, indeed, that precedents *sub silentio* are of little or no authority: but that is to be understood of cases where there are judicial precedents to the contrary: but here there are none, either on one side, or the other. The chief baron mentioned a case in the Exchequer, which I remember: it was an information about the drawback upon salt, and there (as also in some others both here, and in that court) all the exceptions were taken that the wit of man could invent, but this was not so much as mentioned.

We did not think fit to break in upon an intire practice, and shake so many judgments upon a matter of so small moment; and therefore are all of opinion, that the *venire* is well awarded.

The rule must be, that the last trial be set aside upon the other point, on payment of costs.

About three days after this rule for a new trial was pronounced; the defendant moved, that some persons might be named to receive the costs, it not appearing certainly, who was the prosecutor in this cause.

Whereupon, Mr. attorney general named *Borret*, the queen's solicitor, and acquainted the court, that the prosecution was carried on at the proper expence of the crown.

Afterwards the solicitors on both sides went before the master, and the costs were taxed on *Saturday* the 22d of *November*.

And on the *Tuesday* following Mr. *Lechmere* made a motion, upon notice, against the taxation of costs in general, and against some items allowed by the master in particular.

The defendant shall pay costs for a new trial on a *scire facias* being brought by the crown to repeal a charter.

He insisted, that though they had submitted to a rule for the payment of costs, when the cause appeared, even upon the plaintiff's own shewing, to be merely a contention between the old and new corporations, upon the validity of their several charters; yet now it appeared in another light, and was owned by the attorney general as a government prosecution, carried on at the charge of the crown, they ought not to be stopped by that rule, from making it a question, whether in the case of the crown, costs are due by law, this being the first time they took advantage of that point. *Quod fuit concess' per cur'.*

To prove that in cases of the crown, or such as are properly government-prosecutions, costs are not due, he urged the course of the *Exchequer*, where costs are never paid, unless there be a relator, or some other security to answer costs to the party; which there was not in this case, nor could there be, because the prosecution was *in rem*, and not *in personam*; and for that he produced a manuscript of baron *Lechmere*.

That on the crown side in this court, costs had been so far from being allowed in any case, that it had been thought necessary to provide by (a) act of parliament, that there should be a recognizance given to answer costs in some particular cases; but this was none of those; that the law had provided no judgment,

(a) Vide 4th and 5th Gul' and Mar', cap. 18.

ment, nor process for costs, nor method to bring them into the Exchequer.

That if it were otherwise, it would be very unequal; for the queen paid no costs for not going on to trial; nay, Mr. attorney might enter a *noli prosequi*, or a *cesset processus* *, even when the jury were ready to give their verdict at the bar, without costs to the subject.

* Vide post Rex v. Benson, XI.

In the case of the *Queen v. Collins*, (*Michaelmas 10 Annæ*) in an information for a battery upon a custom-house officer, in the execution of his office, a motion was made for costs for not going on to trial; and upon Mr. *Harcourt's* affirmation, that no costs were ever allowed in government prosecutions, the same was denied.

That in the case of the *Queen v. Clerk*, which was an information for a nuisance, viz. for erecting copper mills upon the river *Thames*, there was a verdict for the queen, which by consent was set aside upon payment of costs; the second verdict was for the defendant, who thereupon moved for costs, which were denied for this reason, (*scil.*) because the statute of the 24th of *Hen. VIII. cap. 8.* extends only to trials by *nisi prius*, and not at the bar, as it was in that case.

So in *Hill. 3 W. & M. in Scacc'* in my lord *Montgomery's* case, which was an inquisition on his estate, and but in the nature of an ejectment, there was a verdict for the defendant, and a new trial granted without costs.

Vide post XI.

That here was no prerogative in the case, for the queen and subject were on an equal foot, and if the queen did not pay costs, she ought to receive none.

That this verdict was set aside as unjust, for a misbehaviour of the jury in the face of her

her majesty, who was supposed to be always present in her court of Queen's-bench, which court saw plainly, no just judgment could be entered up on that verdict, and yet the defendants were told, that this injustice must be fastened upon them, unless they paid two or three hundred pounds, to be delivered from it; surely this was to pay for justice, contrary to *magna charta*, which says, *nulli vendimus justitiam*.

That in capital cases, if a jury should obstinately find *generally*, where the court had directed them to find the matter *specially*, the court, no doubt, would set aside such verdict, and that without costs; they would not take away the life of a man, because he had not money to pay costs to the crown.

Now the consequence of this suit was of equal concern to this corporation, as that of a capital prosecution, to the life of a particular person; for the very life and being of this corporation were in question; and if costs were once admitted in the case, those writs of *scire facias*, though they had not yet so harsh a sound in the ears of *Englishmen*, yet, he would undertake to prove, they would have ten times more pernicious effects than *quo warranto*'s of old; for a judgment in a *quo warranto* did not destroy the franchise, but a corporation might still, notwithstanding that, have another struggle for its liberty; but in the case of a *scire-facias*, the judgment was a repeal of the charter; and if a jury could for once be so managed, as to give a partial verdict, it was but getting such costs taxed as a poor borough was not able to pay, and the business would be done; they could not pay the costs, and without that, they should not have

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have a new trial in order to come at right and justice.—This was *laying the ax to the root of the tree*.—The crown indeed was always an unequal match for the subjects: but if the weight of costs were thrown into the scale, this would become such an addition, as would make its prosecutions (a) heavier than they would be able to bear.

The jury having sat up all night, agreed in the morning to put two papers into a hat, marked *P.* and *D.* and so draw lots; *P.* came out, and they found for the plaintiff, which happened to be according to the evidence and the opinion of the judge.

Upon motion for a new trial, it was argued that the verdict must be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence: but at last it was agreed that the costs should wait the event of the new trial.

Chapple moved to set aside defendant's verdict; the jurors upon differing in opinion, agreed to be determined by hustling half-pence in a hat; if the major part came up heads, the verdict was to be for defendants; but this matter not appearing upon the oath of any of the jurors, but by affidavit, that two of them had confessed the same, the court, upon the first motion, ordered the entry of final judgment to be stayed for a few days only, to give plaintiff an opportunity to procure affi-

Hale v. Cove,
M. 12 G. Stra.
642.

Where the jury
drew lots, the
court set aside
the verdict
though it was
according to
evidence.

Parr v. Seames
and others, M.
8 G. II. Barnes
438.

The jury differ-
ing in opinion,
agree to be de-
termined by
hustling half-
pence in an hat.

(a) By the records in the Crown-office it appears, that the defendants were, notwithstanding, ordered to pay costs, and that afterwards on a new trial, the jury found a special verdict, but this does not appear to have been ever argued.

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davits from some of the jurors; but it afterwards appearing that the jurors were fearful to make affidavits whereby to accuse themselves, and *Chapple* citing a case in *Salk.* 645. *Dent* against the hundred of *Hertford*, the court enlarged the rule upon hearing counsel on both sides till next term. *Comyns* for plaintiff.

Vide ante.

Lord St. John v.
Abbot, M.
9 G. II. Barnes
441.
Several of the
jurors leave their
companions, and
are absent for
some time.

This cause was tried at the last *Northampton* assizes before Mr. Justice *Reeve*; and after the evidence was summed up in the forenoon, the jury retired to consider of their verdict: before the rising of the court they came into court, attended by the bailiff, to ask a question, which was answered, and they were sent back. At the sitting of the court in the afternoon, the judge was informed that some of the jurymen (two or three) were in court; whereupon being asked by him what they did there, answered they could not agree, and were thereupon sent back to their fellows; and afterwards a verdict was brought in for plaintiff. The judge did not certify the verdict to be contrary to evidence; the court was of opinion that this was a misbehaviour in the jury, for which they are finable; but not a sufficient cause to set aside the verdict; plaintiff was not in fault. If the jury eat and drink at their own expence, that is a misbehaviour, for which they are finable, but their verdict must stand; though it is otherwise if they eat and drink at the expence of either party. Rule to shew cause why verdict should not be set aside, discharged. *Belfield* for plaintiff, *Birch* for defendant.

Philips v. Fowler, E. 8 G. II
Barnes 441.

After a motion in arrest of judgment, and pending the consideration of the court, it being disclosed to defendant by two of the jurors, that

that they and their fellows being divided in opinion had determined their verdict by *casting lots*. Defendant moved to set aside the verdict upon an affidavit of the fact made by the two jurors *; and upon hearing counsel on both sides, the question was, Whether after a motion in arrest of judgment, defendant in this case could move to set aside the verdict? And the lord chief justice, Mr. justice *Denton*, and Mr. justice *Comyns* were of opinion, that though this motion seems out of time by the general rule of practice, yet as it is founded upon a matter disclosed to the defendant after the motion in arrest of judgment, and is made before judgment pronounced, the court must receive it; and the fact, as to the jurors determining by *chance* being undisputed, the verdict was set aside. (Mr. justice *Fortescue*, *contra*.) *Vide* lord *Fitzwater's* case *. *Salk.* 647. *Skinner* and others for defendant: *Chaple* and others for plaintiff.

Serjeant *Belfield* moves to set aside a verdict, because after the jurors were retired, one of them came out from the rest, and came to the attorney of the other side, and received a bundle of papers from him, which he carried in to the rest.

Fortescue contra, alleges that this was nothing more than a map of the premises, which the judge had held in his hand all the trial.

Lord *Hardwicke*: It will depend only on this, whether it was delivered to the jury by consent of both parties, for if that appeared, it would prevent the parties alleging any thing against it; but as no such consent appears here, the verdict must be set aside.

Jury cast lots to determine their verdict.

* *Vide* *infra* this head, *Vasie v. Delaval*.

* *Post* IX. (12.)

Jennings v. Warne, East. 8 G. II. B. R. Annals 116. After the jury had retired, one left the rest, and went to the attorney for one of the parties, received a bundle of papers, and carried them to the rest of the jury, and afterwards gave a verdict for that party.

Vase v. Delaval,
M. 26 G. III.
B. R. Durnford
and East, 1 V. 11.
Affidavit of a
juror that the
jury having been
divided, tossed
up, and that the
plaintiff had
won, rejected.
* Vide ante.
(a) Vide Barnes
438, 441, 4to
edition.
(b) Vide Cro.
Eliz. 779.

Upon a motion by *Law* for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and the plaintiff's friends won, *Hale v. Cove*, 1 *Stra.* 642. * was cited.

Per LORD MANSFIELD, Ch. J.

The court cannot (a) receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor (b): but in every such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means.

Rule refused.

IV. Of Verdicts contrary to Evidence, of hard Actions, and where there is Evidence on both Sides.

Vide Post VI. Farmer v. Sir Robert Darling ; VIII. Patman v. Vaughan ; and IX. (6.) Smith ex dm. Dormer, v. Parkhurst & al.

The following cases are, in general, arranged in chronological order, and not always classed, according to the above sub-divisions.

In trespass for impounding the plaintiff's cattle, the defendant justified for *common*, and upon that they were at issue in *Derbyshire*, and the jurors being sworn, the bailiff found *Bagshaw*, one of the jurors; reading a letter concerning the cause, and shewed it to the judge, and a verdict given by the jury: and this matter was moved in the then king's-bench to quash the verdict, but denied by the whole court, because the letter and the cause was not certified by the *postea*, and made parcel of it; for, otherwise, the examination of that at the bar after the verdict, shall never quash it. And so it was adjudged between *Vicary* and *Farthing*, 39 *Eliz.* where a church-book was given in evidence, of which you shall never have remedy, except it be entered and made parcel of the record. *Sed Qu.*

Hall v. White,
Pas. 5 Jac.
1 Brownl. 207.
If a book which
ought not, be
given in evi-
dence, the court
above cannot
remedy it, except
it be returned
with the *postea*.
Sed qu.

Vide Post. IX. (4.)

VOL. II.

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Case

Smith v. Bram-
ston, M. 7.
W. III. B. R.
1 Salk. 644.
No new trial, the
action being an
hard one.

Case for negligently keeping his fire, verdict
pro def. Tho' the verdict was against evi-
dence, a new trial was denied, because it is
an hard action; yet *note*, action against the
hundred for a robbery, verdict *pro def.* and
new trial granted. 1 Sid. 58.

In the same book and page is the following case:

Smith v. Fram-
pton, M. 7.
W. III. B. R.
1 Salk. 644.
Hard action,
1 L. Ray 62, 3.
S. C.

In case for negligently keeping his fire, *per*
quod, the plaintiff's house was burnt, the verdict
was for the defendant: and after great debate
and consideration a new trial was denied; be-
cause it is an *hard* action and the jurors are
judges of the fact: and yet HOLT C. J. de-
clared, he was not satisfied with that verdict.
Quare whether the same case with the preceding?

Dunkly v. Wade
Pasch. 5 Ann.
B. R. 1 Salk.
653.

In case for negligently keeping his fire, a
verdict was found for the plaintiff, and a new
trial granted. But *per cur*; had a verdict
been for the defendant, we would hardly have
granted a new trial, because 'tis an *hard* action.

Hard action.

N. B. By Stat. 6 An. c. 31. f. 6. it is
enacted, that no action shall be prosecuted
against any person, in whose house, &c. any
fire accidentally begins, &c. This section is
made perpetual by 10 An. c. 14. f. 1. *Sed qu.*
if not repealed. Vide 12 G. III. c. 73. 14 G. III.
c. 78. f. 101.

Anonymous P.
8 W. III. B. R.
1 Salk. 644.

The court never, or very rarely, grants new
trials in actions for words, *per Holt*, C. J.

Starr. v. Wade.
P. 10 W. III.
B. R. 1 Salk.
647.

Lessor brought *trover* against the lessee, for
trees cut down; yet because the lessee did it in
trenching, and the plaintiff had thereby greater
advantage, tho' the jury found for the defendant,
yet the court would not grant a new trial.

Hard action.

Sparks v. Spicer,
H. 10. W. III. B.
R. 1 Salk. 648.
Hard action. No
intent to injure
or offend.

One was ordered by the judge of assize to
be hanged in chains; the officer hung him in
privato solo; the owner brought trespass, and
upon not guilty the jury found for the de-
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defendant, and the court would not grant a new trial, it being done for convenience of place, and not to affront the owner.

An action brought for 50 l. penalty, for selling half a pint of cherry brandy. The fact was proved upon the trial to be done by defendant's wife; but several circumstances appeared to shew, that she was unwarily drawn in by false pretences. Lord Chief Justice *Eyre*, who tried the cause, directed the jury to find for plaintiff, but they found for defendant contrary to evidence. *Belfield* moved for a new trial, and a rule *nisi causa* was granted, but was afterwards discharged upon shewing cause; the action being hard, and the case having been represented to the commissioners of excise, who refused to direct a prosecution.

Two issues were joined between the parties; and upon trial both were found for plaintiff. Defendant moved for a new trial, and Mr. Baron *Comyns*, before whom the cause was tried, certified the verdict as to one of the issues to be contrary to evidence; but as to the other issue certified it to be right. The court, upon hearing council on both sides, were of opinion that the verdict could not be severed, and being right in part must stand. *Bayner* for defendant; *Darnal* for plaintiff.

Vide Post IX. (6.) Brookes dm. Mence. v. Baldwin.

In ejectment. This cause was tried before lord chief justice at the sittings, and a verdict obtained by lessor of plaintiff. Defendant moved to set aside the verdict, upon affidavits that some material witnesses for him, absented themselves, and did not appear upon the trial; and also prayed the chief justice's certificate, suggesting that the verdict was contrary to evidence.

Phillips, quit tam, v. Scullard. E. 6 Geo. II. Barnes 435. Hard action: and penal.

Huddleston, v. Brigstock and others. M. 7 Geo. II. Barnes 436. Both issues found for plaintiff; one right, the other against evidence.

Vide Post V. Edie. & ano. v. East-Ind. Co. Cont.

Letgoe, upon the Demise of Wheeler, v. Pitt. Barnes 439. Verdict against Evidence. New trial.

evidence. The court rejected the affidavits relating to the witnesses absenting, as immaterial. The chief justice certified, that the premises in question were copyhold, and both parties claimed under one *George Cromwell*, who had made two several surrenders. The question upon the trial was, whether *Cromwell* was *compos mentis* at the time of the surrender under which the defendant claimed? That nothing was objected to *Cromwell's* insanity till twelve years after such surrender; and that the chief justice was of opinion the strength of the evidence was with the defendant. The court ordered a new trial upon payment of costs. *Eyre and Glyde* for lessor of plaintiff; *Chapple and Wright* for defendant.

Howe and Granville M. 1 Ann. B.R. 7 Mod. 117. Evidence on both sides.

Ashley v. Ashley M. 14 Geo. II. in B. R. 2. Stra. 3142. No new trial where there is evidence on both sides.

A new trial was denied after a view, there being evidence on both sides.

The judge who tried this cause (which was upon a promissory note for 5000 l. and which the defendant insisted was forged) certified that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff; but they found for the defendant.

Et per curiam, as there was evidence on the part of the defendant, the jury are the proper judges which scale preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial. The next day

Smith v. Haggins & al. ibid. evidence on both sides.

Anonymous T. 16. and 17. Geo. II. B. R. 1 Wils. 22.

The same rule was laid down, and a new trial denied: though there was but weak evidence for the plaintiff, and the chief justice summed up strongly for the defendant.

On a motion for a new trial in an action by the owner of the inheritance for making a dam cross an ancient water-course, the judge who

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tried the cause, certified that six witnesses were examined at the trial on each side; that the jury found for the defendant, which was against his opinion, but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides, so a new trial was refused.

The defendant's council shewed cause against the court's granting a new trial upon payment of costs; which had been moved for, by the plaintiff's council, upon the foot of the verdict's being *against evidence*.

Mr. *Just. Foster* (who tried the cause) reported it to be an action of trespass, *extremely frivolous*; but sufficiently proved. He said that the defence was a very strong one indeed, in *mitigation of damages*; but yet was not a *sufficient denial of the trespass*: so that, in strictness, the verdict was undoubtedly against evidence; however, he thought the action *so trifling, frivolous, and vexatious*, that he should have thought six-pence damages to have been enough.

Whereupon the court held, that NOTWITHSTANDING *it's being a verdict AGAINST evidence*, (which in general is a good reason for setting aside a verdict and granting a new trial,) yet the action appearing, in *this case*, to be *frivolous, trifling, and vexatious*, and the *REAL damages* little or none, they ought to refuse, and accordingly did refuse to set aside the verdict: and

Lord *Mansfield* added that it would even be a cruelty to the plaintiff, to grant his motion; as he must pay the costs of the former trial, if he should prevail in it; and yet could hope for such very small damages upon a new one. Rule discharged. *Vide Post.* the next case, *S. P. accord.*

No new trial shall be where there was evidence on both sides, though a verdict be against the judge's opinion who tried the cause.

Macrow v. Hull,
M. 30. Geo 11.
B. R. 1. Burr.
11.
Against evidence, but action frivolous.

Farewell, Esq;
v. Chaffey and
others. M. 30.
Geo. II. 1 Burr.
54.
Verdict against
evidence, but
the action fri-
volous.

* Vide ante the
preceding case,
Macrow v. Hull.
S. P. and Post.
Dr. Burton v.
Thompson. M.
1758. S. P.

Vide ante.

Vide Tab. Caf.

Vide ante.

Rex v. White
and Ward, E. T.
30 Geo. II. B.
R. 1 Burr. 333.
Motion for a
new trial, where
defendants con-
victed of a nui-
sance, on the
ground of the
verdict being
against evidence

This cause was tried upon the western circuit, the last Summer assises, before Mr. Serjeant *Willes*; who certified "that the *weight of the evidence was against the verdict.*" But a *new trial* was denied, upon the *nature* of the action, the *value* of the matter in dispute, and *other circumstances* of the case. *

Lord MANSFIELD said, A NEW TRIAL ought to be granted, to attain *REAL justice*; but *not* to gratify litigious passions, upon every point of *summum jus*; and cited *Smith v. Bramston*, and *Smith v. Frampton*, in 2 Salk. 644. and an anonymous case there also mentioned, of P. 8 W. III. B. R. and likewise *Smith v. Page*, M. 8. W. III. B. R. *ibidem*; also *Deerly v. The Dutchess of Mazarine*, H. 8. W. III. B. R. 2 Salk. 646. and *Sparks v. Spicer*, H. 10. W. III. B. R. in the same book, *pa.* 648. To which may be added, what is said by the court, in the case of *Dunkly v. Wade*. P. 5. Ann. 2 Salk. 653.

In these cases, the verdicts were against evidence, and the strict rule of law, or obtained through surprize: but the court would not give a second chance of success to a *hard action*, or an *unconscionable defence*.

Therefore the court, upon the *same principles*, refused to grant a new trial in the present case, and discharged the rule to shew cause why there should not be one.

The defendants had been convicted of a NUISANCE, in erecting and continuing their works at *Twickenham*, for making acid spirit of sulphur, oil of vitriol, and oil of *aqua fortis*. The indictment ran thus, *viz.* That "at the PARISH of *Twickenham*, &c. near the king's common highway there, and near the dwelling houses of several of the inhabitants,

"the

“ the defendants erected twenty buildings for
 “ making noisome, stinking and offensive
 “ liquors; and then and there made fires of
 “ sea-coal and other things, which sent forth
 “ abundance of *noisome, offensive and stinking*
 “ smoke; and made, &c. great quantities of
 “ *noisome, offensive, stinking* liquors; called, &c.
 “ whereby and by reason of which noisome,
 “ offensive, and stinking, &c. the air was
 “ *impregnated with noisome and offensive stinks*
 “ *and smells*; to the common nuisance of all
 “ the king’s liege subjects, *inhabiting, &c.* and
 “ travelling and passing *the said king’s com-*
 “ *mon highway, and against the peace, &c.*”

Sir Richard Lloyd—for the defendants—(on Monday, 15th November, 1756,) would have moved a *mixed* motion; viz. both for a *new trial*, and also in *arrest of judgment*; or, at least, in *arrest of judgment first*, and for a *new trial afterwards*. But

The court held that neither of these methods could consist with the GENERAL RULE of the court, or with a particular rule made in this case, to give them leave to move *either* of these motions on this day, though the four days given upon the *postea* were expired. Whereupon Sir Richard was obliged to begin with the motion for a *new trial*. And he said that this indictment was laid for making a liquor from whence the air was impregnated with *noxious, hurtful, unwholsome*, and stinking qualities: and the *English* word, “noxious” answers to the Latin “*nocivus*.” But it appeared he said, upon the evidence, that the fumes, however offensive and disagreeable to many persons, were by no means in reality *noxious, hurtful, or unwholsome*; but the contrary.

Rule to shew cause: With this addition,—
 “ That the defendants should have three days
 “ time to move in arrest of judgment; *after*
 “ the court shall have given their opinion
 “ upon the *present* motion, for a new trial, as
 “ upon a verdict AGAINST *evidence*.”

On *Tuesday* the 23d. of the same month,
 Mr. Just. DENISON reported the evidence;
 which was of great length, he said, there being
 about 75 witnesses on each side: however, he
 collected the *substance* of it together in his
 report.

It appeared to be very strong on the part
 of the prosecution: and he declared himself
satisfied with the verdict. And it appeared
 upon his report, that the smell was not only
intolerably offensive, but also *noxious* and *hurtful*,
 and made many persons sick, and gave them
 head-achs.

Mr. Just. FOSTER said that “*noisome*” and
 “*noxious*” were synonymous terms; and that
 there was no other *Latin* word for “*noxious*,”
 but “*nocivus*.”

The rule was therefore DISCHARGED, as to
setting aside the verdict.

Bright, Exor.
 of Hannah Crisp,
 widow, v. Eynon.
 T. 30 and 31.
 Geo. II. B. R.
 1 Burr. 390.
 Evidence on
 both sides.

The plaintiff's counsel moved for a NEW
 TRIAL, upon payment of costs; and obtained
 a rule “ to shew cause why this *verdict* should
 not be SET ASIDE upon payment of costs.”

Lord Mansfield said that he did not choose,
 in any cause, tried before him, to conclude
 the matter by a short report, “ that he was
 “ *satisfied*, or *dissatisfied*, with the verdict.”
 He would state the case particularly to the
 court; and reserve declaring his opinion of
 the verdict, (which he had not yet intimated,
 either at the trial or since,) ’till he had heard
 the counsel on both sides.

This

This was an action upon the case, brought by the plaintiff, as executor of *Hannah Crisp*, widow, deceased, against the defendant, upon a promissory note, in the following words, (all of the defendant's own writing,) which was proved and read: "I acknowledge to have borrowed of Mrs. *Hannah Crisp*, this 29th. day of *September*, 1753, the sum of 60 l. for which I promise to pay 5 l. *per cent. per annum*, and to be accountable for the whole, six months after notice given for that purpose. *John Eynon. September 29th, 1753.*"

The defendant set up a *discharge*, by a writing in the following words: "I promise unto *John Eynon*, that, *in consideration* of his paying unto ME, interest for 60 l. he has of mine, during my life, after the rate of 5 l. *per cent. per annum*, that then the said 60 l. at my decease, shall be *his*, and his note for the same shall be *void*, and of *none effect*. Witness my hand, this 10th day of *October*, 1753. *Hannah Crisp.*" The body was all his own hand; but he called two witnesses who said they believed the name subscribed to be the hand of the testatrix: but their knowledge of her hand was very slight, one of them having only seen her sign a receipt.

He alledged that she gave this discharge, in consideration of a marriage between him and *Rebecca Bright* his now wife, (sister to the plaintiff.)

He produced a will, in his own custody, bearing date the 11th of *August*, 1753, by which the testatrix had made the said *Rebecca Bright* her executrix and residuary legatee.

This marriage was not till *May*, 1754: the testatrix died in *April*, 1756.

It

It came out, upon his own evidence, that the testatrix was not worth 200 l. and that she paid five shillings a week, or at the rate of 13 l. a year, for her board. He could make no proof of the consideration alledged: the farthest that any of his witnesses went was to say, "that the testatrix seemed to approve the match."

The plaintiff in reply, insisted "that the signature was forged." *Josiah Bright* swore, that the defendant's wife did not know the defendant had borrowed any money from the testatrix, 'till after she was married. After she was acquainted with it, she pressed him to pay the money, out of a legacy of 150 l. from one *Sarah Hart*, which he received: for the testatrix might call it in. The defendant bid her not be uneasy: "for I must have six months notice."

Several witnesses proved, that *Hannah Crisp*, about *Michaelmas*, 1754, talked of calling in the money upon this note, and lending it to other persons.

That in 1755 and 1756, she ordered letters to be wrote to the defendant for the money; when she gave these orders, she produced the defendant's note, and said "the interest was not enough to maintain her."

It was proved that the defendant entered a *caveat* at *Doctors-commons*, in *April*, 1756: and when he found she had made a will in favour of the plaintiff, and consequently revoked that which was in favour of his wife; he was very warm, and mentioned a note from him to her; and declared he would not withdraw his *caveat*, unless it was given up.

The plaintiff examined no witness, to say the signature was not her hand; by way of rejoinder,

rejoinder, they called witnesses to the defendant's character : who gave him a good one.

The defendant instructed his counsel to say, that he always understood the gift to be revocable by *Hannah Crisp* during her life ; but if she did not revoke or call in the money during her life, then the debt was to be discharged.

The principal question made at the trial was, " whether this latter note was forged, or " not." And as to that, the two witnesses who believed it to be her hand, were not opposed by any witnesses to the contrary : the reason given, was, that they had no opportunity of getting it inspected.

His lordship said, he left two questions to the jury : (1st.) " Whether the name of the " testatrix was *forged* ; (2nd.) If they took it upon the evidence laid before them to be her hand, then " Whether it was not obtained by " *fraud*, and without her *knowing* the contents " and effects of the writing *she* signed."

The jury found for the defendant.

Lord *Mansfield* intimated nothing, then, as to *his own* opinion of the case ; and professedly avoided doing it now, 'till he should have heard the counsel.

They were accordingly heard. And they who shewed cause against the rule, went very much at large into the *propriety* and *rise* of granting *new trials*. They urged that a verdict ought to be *conclusive*, where evidence of any sort was given on *both* sides. That the *forgery* here was the *only* question : and if the plaintiff objected *fraud* and *imposition*, he must go to a court of *equity* for relief.

LORD MANSFIELD.—Trials by jury, in civil causes, could not subsist now, without a power, *somewhere*, to grant new trials.

If

If an erroneous judgment be given in point of law, there are many ways to review and set it right.

Where a court judges of fact upon *depositions in writing*, their sentence or decree may, many ways, be reviewed and set right.

But a general verdict can *only* be set right by a *new trial*: which is no more than having the cause more deliberately considered by another jury; when there is a reasonable doubt, or perhaps a certainty, that *justice has not been done*.

The writ of *attaint* is now a mere sound, in every case: in many it does not pretend to be a remedy.

There are numberless *causes* of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter, before the trial; and imbibed prejudices, without knowing it. The cause may be intricate: the examination may be so long as to distract and confound their attention.

Most general verdicts include *legal consequences*, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law.

The parties may be *surprized*, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer.

If *unjust* verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property in this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial. And it is done in a way
very

very favourable to the parties for whom the wrong verdict is given: it is, *upon* payment of *costs*. Whereas in *other* cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance.

It is NOT true "that no new trials were granted *before* 1655:" as has been said from *Style* 466.

In *Slade's* case, *M. 24. C. 1.* (which was in 1648,) in *B. R.* reported in *Style* 138. The court was moved for judgment formerly stayed upon a certificate, made by Baron *Atkins*, "That the verdict passed against his opinion." *Bacon* justice said, "judgments HAVE BEEN arrested in the *common-pleas*, upon such certificates." *Hales*, of counsel with the defendant, prayed that the judgment in that case of *Slade* might be arrested, and that there might be a new trial; for that it HAD BEEN DONE THEREFORE, in like cases. Indeed that case, as there reported, represents *Roll* justice to hold "that it ought not to be stayed, *though it have been done* in the *common-pleas*: for that "it was too arbitrary for them to do it." And he adds, "You may have your attain against the jury; and there is no other remedy in law for you; but it were good to advise the party to suffer a new trial, for better satisfaction."

In the case of *Wood v. Gunston, Michaelmas, 1665, Banc. Sup. Style* 466. (which was an action upon the case, for speaking scandalous words of the plaintiff, and a verdict for the plaintiff, with 1500 l. damages,) the defendant moved for a new trial. And *Glyn* chief justice said, "It was in the discretion of the court, in some cases, to grant a new trial; but this
" must

Vide Post VI.

" must be a *judicial* and *not an arbitrary* discretion. And it is FREQUENT IN OUR BOOKS, for the court to take notice of the miscarriages of juries, and to grant new trials upon them. And it is for the people's benefit that it should be so: for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them; but it cannot be so intended of the court." And in that case a new trial was ordered, upon the defendant's paying full costs; the judgment standing as a security to pay what might be recovered upon the next verdict.

The reason why this matter cannot be traced farther back, is that the old report-books do not give any account of determinations made by the court upon motions."

Indeed, for a good while after this time, the granting of new trials was holden to a degree of *strictness* so intolerable, that it drove the parties into a court of equity, to have, in effect, a new trial at law, of a mere legal question, because the verdict in justice, under all the circumstances, *ought not to conclude*: and many bills have been retained upon this ground; and the question tried over again at law, under the direction of a court of equity; and therefore of late years, the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by lord Parker, in the case of the queen against the corporation of *Helfton*, H. 12 Ann. B. R. (*Lucas* 202.) seems to be the best general rule that can be laid down upon this subject, viz. "doing justice to the party," or in other words, attaining the justice of the case."

The

The REASONS for granting a new trial must be collected from the *whole* evidence, and from the *nature* of the case, considered under *all its circumstances*.

The power may be exercised at much less expence of time and money, therefore *more beneficially for the subject*, by the court of *common law* where the cause has been tried.

Of late years, new trials have been granted not only after trials at *nisi prius*, but also after trials *at bar*. And it is at least *equally reasonable* to do it after trials at bar, as after trials at *nisi prius*, (if the justice of the case demands it;) or indeed, rather *more* so, as the latter must be done upon what could have actually and personally appeared to a *single* judge only, whereas the former is grounded upon what must have manifestly and fully appeared to the *whole* court.

I come now to the present verdict; and should be sorry that the question depended upon *my* being satisfied, or dissatisfied: and therefore I have stated the whole.

If the matter in dispute was of *great value*, I will not say that all the suspicious circumstances *might not* be a ground for a new trial; to give the plaintiff an opportunity of getting the instrument *inspected* by persons acquainted with her *hand*: though I think upon the evidence *laid before the jury*, the verdict, in *that* respect, was *right*.

What I go upon is the apparent manifest FRAUD and IMPOSITION in *obtaining* the discharge from the testatrix, if *SHE really* signed it.

FRAUD or COVIN may, in judgment of the law, *avoid* every kind of act: many instances are put in *Fermor's case*, 3 Co. 77.

"What circumstances and facts amount to such fraud or covin," is always a question of law. Courts of equity, and courts of law, have a *concurrent* jurisdiction, to suppress and relieve against FRAUD. But the interposition of the former is often necessary for the *better investigating* truth, and to give *more complete* redress.

The writing, upon the *face* of it, speaks IMPOSITION. It purports being for *consideration*. She releases the principal, *in consideration* of 5 l. *per cent.* during her life: which is only legal interest, and the precise rate he was obliged to pay by his note. The defendant has set up *another* consideration, *not* expressed; which is not only *not proved* by him, but *disproved* by the evidence on both sides.

He now contends, and his counsel have argued, "that it was intended to be revocable" by her during her life; and therefore was "only in the nature of a legacy." That power "to revoke," *is omitted*. The writing, all of his *own hand*, and kept in his *own custody*: and if it was in the nature of a legacy, it is *revoked* by the subsequent will.

The testatrix *never imagined* she had stripped herself of this money: in her *circumstances*, it would have been madness. The defendant, *during her life*, did not dare to say, even to his own wife, "that the testatrix *had given* him this money."

He did not dare to claim it, *immediately*, after her death: but would have *compounded*, by withdrawing his caveat, to have got his note delivered up. *No answer* was attempted, by proof, to the *apparent imposition*. Upon his own case stated by himself, and the evidence on both sides, the transaction to get her

her hand to this writing must have been *fraudulent*: and if it be so, the law says "he shall not avail himself of it."

The *attention* of the jury was artfully drawn to the heinous charge of forgery *only*. And I left the question of FRAUD to them, without any *express* direction, "that the circumstances spoke fraud apparent." The *same* jury might, upon reconsideration, find a *different* verdict. I dare say they *meant* to do right.

But the merits of the case appearing to me in this light, I am clearly of opinion that there *ought* to be a NEW TRIAL.

These are my sentiments: my brothers will judge whether I am right, or not.

Mr. Justice DENISON concurred in them.

He added, that it would be difficult perhaps to fix an *absolute general rule* about granting new trials, without making so many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting a new trial, or refusing it, must depend upon the LEGAL DISCRETION of the court, guided by the *nature and circumstances* of the particular case, and directed with a view to the *attainment of justice*.

In the present case, he said, it appeared to him, "that the testatrix, Mrs. *Crisp*, had been *imposed upon*:" and he held that FRAUD "was sufficient to *invalidate* this her *deceit* (the subsequent note of discharge signed by her,) even in a court of COMMON LAW." For proof of which, he cited *Thoroughgood's case*, 2 Co. 9. where it was holden, "that the deed of an unlettered layman, into the execution whereof he is *deceived*, by its being wrong read to him, or *falsely ex-*
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"plained to him, (though by a stranger to the party to whom the deed was made,) shall not bind the unlettered person who made it."

Mr. Justice FOSTER agreed to the propriety of what had been said, as to such cases in which the juries give verdicts *against* evidence, and even as to cases where there may be a contrariety of evidence, but where the evidence upon the whole, in point of probability, greatly *preponderates against* the verdict; (which depending on a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule;) but in all cases where the evidence is *nearly in equilibrio*, he declared that he should always think himself bound to have regard to the *finding of the jury*; for, "*ad quæstionem * facti respondent juratores.*" In such a case, it is *not* the province of the judge to determine: it ought to be left to the jury.

* See Trials per Pais, p. 447. extremely strong on this subject, in favour of juries.

FRAUD will *invalidate* in a court of law, as well as in a court of equity. We all remember the case of *Wyndham v. Chetwynd*, P. 1755, 28 G. II. in this court, where the court directed the jury to find "*non devisavit*," though there was a *devise in fact*, but it was *obtained by fraud*, and therefore considered as no *devise* at all.

And he agreed with Lord Mansfield and Mr. Justice Denison, that in the present case, the defeazance or discharge (the subsequent note) was obtained from Mrs. Crisp by fraud: and that it *appeared*, upon the whole of the evidence, "*that it was so obtained*:" and that the jury have drawn a *WRONG CONCLUSION* from facts *admitted on both sides*. Therefore he thought the verdict ought to be set *aside*.

Per

Per Cur. * unanimously,

The RULE for *setting aside* the verdict was made *absolute*.

On shewing cause against a rule for a NEW TRIAL, which had been moved for by the plaintiff, upon an allegation "that the verdict (which was found for the defendant) "was given *contrary to evidence*;"

Dr. Burton v. Thompson, M. 32 Geo. II. 2 Burr. 664. Against evidence, but damages inconsiderable.

Mr. Justice FOSTER, (who tried the cause) now reported, that it was an action for a libel; that the charge *was proved* by the plaintiff; but that the *injury* done to him thereby, appeared upon the evidence to be *so* VERY INCONSIDERABLE, that if the jury had found for the plaintiff, he should have thought a *half-crown*, or even a *much smaller sum*, to have been *sufficient* damages: but that the jury had gone too far; and instead of giving the plaintiff very small damages, had found a verdict *against* him; which was certainly a verdict AGAINST EVIDENCE.

Lord MANSFIELD.—It does not follow by necessary consequence, that there must ALWAYS be a new trial granted, in *all* cases whatsoever, where the verdict is *contrary to evidence*: for it is possible that the verdict *may* still be on the side of the *real* justice and equity of the case. And of this there are several in-

* Mr. Justice *Wilnot* was absent, in Chancery. Mr. *Gould*, of counsel for the plaintiff, moved that it might be *without costs*: but was answered by Mr. Justice *Denison* and Mr. Justice *Foster*, (Lord *Mansfield* being now gone,) that this was directly contrary to the terms upon which he himself had moved it. And accordingly they only ordered the verdict to be set aside, upon payment of costs by the plaintiff.

Memorandum.—The cause never came on to be tried again. Probably the defendant acquiesced in the opinion of the court, and paid the money.

* See title Trial
in 2 Salk. pl. 2,
3, 4, 5, 11,
18, 34. See
before, Farewell,
Esg; v. Chaffey
et al'. † Vide
post V.

stances in the * printed books, particularly the dutchess of *Mazarine's* case in 2 Salk. 646. [*Dearly v. the dutchess of Mazarine*, † which is directly in point.]

Here the jury have found for the defendant, whereas my brother FOSTER, who tried the cause (which the plaintiff has brought hither out of *Yorkshire*) says that "he thinks *half a crown, or less, would have been damages sufficient, if they had given their verdict for the plaintiff.*" He must pay the costs, before he can have a new trial. Therefore I do not think that we ought to interfere, merely to give the plaintiff an opportunity of harassing the defendant at a great expence to himself; where there has been *no real damage*, and where the injury is so *trivial* as not to deserve above an half-crown compensation. Besides the plaintiff has brought the action to be tried at a great distance from the proper county. The cause of action is in the nature of a *crime*: the implied damages are, in some measure, by way of *punishment*. An indictment or information would lie. And in *criminal* cases, where the defendant is acquitted, a new trial cannot be granted.

Mr. Justice Denison, Mr. Justice Foster, and Mr. Justice Wilmot, all spoke in very explicit terms to the same effect.

Per Cur. unanimously,

The rule to shew cause why there should not be a new trial, was DISCHARGED.

Pillans and Rose
v. Van Mierop
and Hopkins,
E. 5 Geo. III.
B. R. Tuesday,
30 April, 1765.
3 Burr. 1663.
Against eviden-
Of a nudum pac-
tum.

On Friday the 25th of January last, Mr. Attorney General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict *against evidence*: the substance of which evidence was as follows.

One

One *White*, a merchant in *Ireland*, desired to draw upon the plaintiffs, who were merchants at *Rotterdam* in *Holland*, for 800*l.* payable to one *Clifford*, and proposed to give them credit upon a good house in *London*, for their reimbursement, or any other method of reimbursement.

The plaintiffs, in answer, desired a confirmed credit upon a house of rank in *London*, as the condition of their accepting the bill. *White* names the house of the defendants, as this house of rank, and offers credit upon *them*. Whereupon the plaintiffs honoured the draft, and paid the money; and then wrote to the defendants *Van Mierop* and *Hopkins*, merchants in *London*, (to whom *White* also wrote about the same time,) desiring to know, "whether they would accept such bills as they, the plaintiffs, should, in about a month's time, draw upon the said *Van Mierop's* and *Hopkins's* house here in *London*, for 800*l.* upon the credit of *WHITE*:" and they, HAVING RECEIVED THEIR ASSENT, accordingly drew upon the defendants. In the interim, *White* failed, before their draft came to hand, or was even drawn: and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them; which they, nevertheless, did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon shewing cause, on *Monday* the 11th of *February* last, it turned upon the several letters that had respectively passed between the plaintiffs and defendants, and *White*. The letters were read: 1st. Those * from *White* and Co. in *Ireland*, to the plaintiffs in *Holland*; (by which

See post, Mr. J. Wilmot's 2d argument in this case.

* Dated 16th February, 1762.

• Dated 19 Mar.
1762.

which it appeared that *Pillans* and *Rose* had then accepted the bills drawn upon them by *White*, payable to *Clifford*;) then those of the plaintiffs to the defendants; and also *White*'s to the defendants; then those of the defendants to the plaintiffs, * *agreeing to honour their bill* drawn on account of *White*; the letter from the defendants to the plaintiffs, informing them "that *White* had stopt payment," and desiring them *not* to draw, as they *could not accept* their draft; and lastly, that which the plaintiffs wrote to the defendants, "that they *should draw on them*, holding them *not to be at liberty* to withdraw from their engagement."

The COUNSEL for the defendants were Mr. Serjeant *Davy* and Mr. *Wallace*. They observed that the plaintiffs had *given credit to White*, above a month *before* the defendants had agreed to accept their draft: for it appears by *White*'s letter of 16th February, 1762, that *Pillans* and *Rose* had then *actually accepted Clifford's bills*: but *Van Mierop* and *Hopkins* did not agree to honour their drafts till the 19th of March, 1762: therefore the consideration was *past* and done, *before* their promise was made. And they argued, and principally insisted, "that for one man to *undertake to pay another man's debt*," was a *void undertaking*, unless there was *some consideration* for such undertaking; and that a mere general promise, *without benefit* to the promiser, or loss to the promisee, was a *nudum pactum*. And they cited 1 *Bullst.* 120. *Thorner v. Field*. *Dyer* 272. pl. 31. *Hunt v. Bate*, 2 *Vern.* 224, 225. *Cecil et al. v. Earl of Salisbury*, 1 *Ro. Abr.* 11. pl. 1. letter Q. "Consideration executed." *Yelv.* 40, 41. and 2 *Strange* 933.

Hayes

Hayes v. Warren; where a past consideration was holden insufficient to raise an assumption.

* See likewise
Hardres 72, 73,
74.

The COUNSEL for the plaintiffs were Mr. Attorney General, Mr. *Walker*, and Mr. *Dunning*. They denied this to be a *past* consideration; and insisted, that the liberty given to the plaintiffs, "to draw upon a confirmed house in London," (which was prior to the undertaking by the defendants,) was the *consideration of the credit given by the plaintiffs to White's drafts*; and that this was a *good and sufficient consideration* for the undertaking made by the defendants. It relates back to the original transaction.

If any one promises to pay for goods delivered to a third person, such promise, being in writing, is a *good* one.

And here *White* had had 800*l.* from the plaintiffs, upon this assurance: and the defendants undertake in *writing*, in pursuance and completion of this original assurance, to be answerable for *White's* reimbursing the plaintiffs; and a promise in *writing* is out of the statute.

This case does not fall within those that have been cited: for *Van Mierop* and *Hopkins* have made themselves *originally liable*. An *ex post facto* event cannot alter the nature of an *original promise*. Their *original promise* made them liable, and *bound* them; and they are obliged, both by law, and in honour and honesty, to perform it.

It is a mercantile transaction; and it must be considered, upon the whole of it, as an admittance "that the defendants either had, or soon would have, effects of *White's* in their hands."

LORD MANSFIELD.—The objection is, “that the letter whereby *Van Mierop* and *Hopkins* undertake to honour the plaintiffs bills, is “*nudum pactum*.” The other side deny it.

This is the only question *here*.

But this is quite different from what passed at the trial: the *nudum pactum* was not mentioned at *that* time. The grounds it was argued upon *there*, were, 1st, That this imported to be a credit given to *Pillans* and *Rose*, in prospect of a *future* credit to be given by them to *White*; and that this credit might well be countermanded *before* the advancement of any money: and this is so. 2dly, That there was a *fraud*; for that *Van Mierop* and *Hopkins* had reason to think that *White* had sent goods to *Pillans* and *Rose*; whereas this was a mere *lending of credit*. 3dly, That if *Pillans* and *Rose* had received goods from *White*, and retained them 'till he failed, the defendants undertaking was revocable.

I was then of opinion, that *Van Mierop* and *Hopkins* were bound by their letter, *unless* there was some *fraud* upon them: for that they had engaged under their hands, in a *mercantile transaction*, “to give credit for *Pillans* and “*Rose's reimbursement*.” And I did not see it to be *future*, as had been objected; nor did I see any *fraud*. And nothing was then urged about its being *nudum pactum*.

I have no idea, that promises “for the debt “of another,” are applicable to the present case.

THIS IS (as Mr. *Walker* said) a *mercantile transaction*; and it depends upon these letters from merchant to merchant about *concuring bills* to such an amount: and this credit is given upon a supposition, “that the person who

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" who is to draw upon the undertakers within
 " a certain time, *has goods* in their hands, or *will*
 " *have them.*" Here, *Pillans* and *Rose* trusted
 to this undertaking: and there is *no fraud.*
 Therefore it is quite upon *another foundation*
 than that of a *naked* promise from one " to
 " pay the debt of another."

Mr. Justice WILMOT.—I own, the *want* of
 consideration, *at first*, occurred to me: but I
now am satisfied, that this case has nothing to
 do with the cases of undertakings by one " to
 " pay the debt of *another.*" In *those* cases it
 is settled, " that where the consideration is
 past, the action will *not* lie:" and yet this
 seems a *hard* case. The meer promise " to
 " pay the debt of another," without *any* con-
 sideration at all, is *nudum pactum*: but the
least spark of a consideration will be sufficient.
 It seems almost implied, that there must be
some consideration: but *if* there be none at
 all, it is *nudum pactum*. The statute must
 mean such a special promise as would have
 supported an action.

But ALL this is out of the *present* case. So
 also, I think, is all the *precedent* correspon-
 dence.

It lies in a narrow compass.

White, *Pillans*, and *Rose*, and *Van Mierop* and
Hopkins, had all a correspondence together;
 they have intercourse together, mutually, in
 mercantile transactions. *Pillans* and *Rose* write
 to *Van Mierop* and *Hopkins*, to know " whether
 " they will honour their drafts for 800*l.* in
 " about a month's time." They say, they
 will. Now it strikes me, as Mr. *Walker* said,
 that it admits " that they either have assets or
 " effects of *White's* in their hands," or " that
 " they have credit upon him." Now by *this*
 under-

undertaking of a good house in London, and relying upon it, they are deluded and diverted from using any legal diligence to pursue White, or even not to part with any effects of his which they might have in their hands. Therefore this seems to be an irrevocable undertaking by Van Mierop and Hopkins: and they ought to be bound by it. Consequently, there ought to be a new trial.

LORD MANSFIELD.—A letter of credit may may be given as well for money *already* advanced, as for money to be advanced *in future*.

Let it be argued again the next term; and you shall have the opinion of the *whole court*.
Ulterius concilium.

Yesterday, this matter accordingly came on again; and was argued by Mr. *Wallace*, for the defendant; and by the same counsel as argued last term, for the plaintiffs.

The latter repeated and enforced their arguments: they said the consideration moved from *White* to the defendants; not from the plaintiffs *Pillans* and *Rose*, to the defendants: and as the defendants have undertaken for *White*, they can't revoke or retract their engagement.

This case is not like the cases cited; some of which are strange cases, and not founded on solid or sufficient reasons; and in others of them, there was *no* meritorious consideration at all. And Mr. *Walker* cited *Hardres* 71. *Reynolds v. Prosser*; where the consideration was adjudged sufficient, notwithstanding all the reasoning of Sir *Thomas Hardres*, and all the cases cited by him.

That was an *assumpsit* by a stranger, in consideration that the plaintiff would forbear to prosecute Lord *Abergavenny* upon a judgment,

in

in the name of the original plaintiff, by virtue of a letter of attorney "to receive it to his own use."

Serjeant *Davy* was heard, this morning, on behalf of the defendants; and urged, that the plaintiffs gave credit to *White*, upon his promising to reimburse them: and he said, there was a fraudulent concealment of facts.

WHITE's first letter could have no influence on the plaintiffs. For they *afterwards* desired a confirmed credit upon a house of rank in *London*: so that they did not rely on *White's* first letter which offered credit on the defendants, or any other method of reimbursement. And nothing had *then* passed between *White* and the defendants. For the first letter between them was on the 16th of *February*, (a fortnight after:) and then the defendants were *deceived* into a false opinion "that it was for a future credit, and not to secure a *past* acceptance of *White's* bills by the plaintiffs." And this *concealment* of circumstances is sufficient to vitiate the contract. The PLAINTIFFS had accepted a bill of 800 l. of *White's*, a fortnight before the defendant's letter of 16th *February*: which bill the plaintiffs had accepted upon assurance of credit on a house in *London*, to reimburse them. And this transaction was *fraudulently concealed*, both by *White* and the plaintiffs, from the defendants.

If this had been disclosed, the defendants would have plainly seen "that the plaintiffs *doubted* of *White's* sufficiency;" by their requiring *further* security for his *already contracted* debt.

All letters of credit relate to *future* credit; not to debts *before* incurred: nor can the ad-
vancer

vancer of money thereupon, include an *old DEBT* before incurred.

A bill cannot be accepted before it is drawn. This is only a *promise* to accept: for it is only a promise "to honour the bill; not a promise "to pay it."

A promise "to pay a *past* debt of another "person" is void at common law, for want of consideration; unless there be at least an implied promise from the debtor "to forbear "suing the original debtor." But here was a debt clearly contracted by *White* with the plaintiffs on the credit of *White*: and there is no promise from the plaintiffs "to forbear "suing *White*." A *naked* promise is a void promise: the consideration must be *executory*, not *past* or *executed*.

Lord MANSFIELD asked, if any case could be found, where the undertaking holden to be a *nudum pactum* was in writing.

Serjeant Davy.—It was *antiently* doubted, "whether a *written* acceptance of a bill of "exchange was binding, for want of a consideration." It is so said, somewhere in *Lutwyche*.

Lord MANSFIELD.—This is a matter of great consequence to trade and commerce in every light.

If there was any kind of *fraud* in this transaction, the *collusion* and *mala fides* would have *vacated* the contract: but from these letters, it seems to me clear, that there was *none*. The first proposal from *White*, was "to reimburse the plaintiffs by a remittance, or by credit "on the house of *Van Mierop*." This was the *alternative* he proposed. The plaintiffs chose the *latter*. Both the plaintiffs and *White* wrote to *Van Mierop* and company; they answered,

" that they would *honour* the plaintiffs draft." So that the *defendants assent to the proposal made by White, and ratify it.* And it does not seem at all, that the plaintiffs then doubted of *White's* sufficiency, or meant to conceal any thing from the defendants.

If there be *no* fraud, it is a mere question of *law.* The law of *merchants,* and the law of the *land,* is the *same.* A witness cannot be admitted, to prove the *law* of merchants. We must consider it as a point of *law.* A *nudum pactum* does not exist, in the usage and law of merchants.

I take it, that the ancient notion about the want of consideration was for the sake of *evidence* only: for when it was reduced into *writing,* as in covenants, specialties, bonds, &c. * *Vide 3 Burr. 1639.* there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle.

In *commercial* cases amongst merchants, the want of consideration is *not* an objection.

This is just the same thing as if *White* had drawn on *Van Mierop* and *Hopkins,* payable to the plaintiffs: it had been nothing to the plaintiffs, whether *Van Mierop* and *Co.* had *effects* of *White's* in their hands, or not; if they had *accepted* his bill. And this amounts to the same thing:—" I will give the bill due " honour," is, in effect, *accepting* it. If a man agrees " that he will do the formal part," the law looks upon it (in the case of an acceptance of a bill) as if *actually done.* This is an engagement " to accept the bill, if there " was a necessity to accept it; and to pay it, " when due:" and they *could not afterwards retract.* It would be very destructive to trade and to trust in commercial dealings, if they could.

could. There was nothing of *nudum pactum* mentioned to the jury; nor was it, I dare say, at all in *their* idea or contemplation.

I think the point of *law* is with the plaintiffs.

Mr. Justice WILMOT.—The question is “whether this action can be supported, upon the *breach* of this agreement.”

I can find none of those cases, that go upon its being *nudum pactum*, that are in *writing*: they are all upon *parol*.

I have traced this matter of the *nudum pactum*: and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*; and how the notion of a *nudum pactum* first came into *our law*.

He said it was echoed from the *civil law*,—“*Ex nudo pacto non oritur actio.*” *Vinnius* gives the reason, in *lib. iii. tit. De Obligationibus*, 4to. edition, 596. If by *stipulation*, (and à *fortiori*, if by *writing*,) it was good *without* consideration. There was no *radical* defect in the contract, for want of consideration: but it was made requisite in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view, either *writing* or certain *formalities* were required. *Idem.* on *Justinian*, 4to. edit. 614.

Therefore it was intended as a guard against rash inconsiderate declarations; but if an undertaking was entered into upon *deliberation* and *reflection*, it had activity; and such promises were *binding*. Both *Grotius* and *Puffendorf*, hold them *obligatory* by the law of nations. *Grot. lib. ii. c. 11. De Promissis.* *Puffend. lib. iii. c. 5.* They are *morally* good; and only require *ascertainment*: therefore there is no reason

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reason to extend the principle, or carry it further.

There would have been no doubt upon the present case, according to the *Roman* law; because here is both *stipulation* (in the express *Roman* form) and writing.

Bracton (who wrote * *Temp. Hen. III.*) is the first of our lawyers that mentions this. His writings interweave a great many things out of the *Roman* law. In his third book, *cap. i. De Actionibus*, he distinguishes between *naked* and *cloathed* contracts. He says that "*obligatio est mater actionis*;" and that it may arise *ex contractu, multis modis; sicut ex conventionione, &c. sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, &c. &c.*

Our own lawyers have adopted exactly the same idea as the *Roman* law. † *Plowden* 308. b. in the case of *Sharyngton* and *Pledal. v. Strotton* and others, mentions it: and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base,) and contracts or agreements in writing, (which are more high;) and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the *Roman* lawyers had said. "*Words pass from men lightly*:" but where the agreement is made by *deed*, there is more time for deliberation. For when a man passes a thing by deed, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed. "The delivery of the deed is a ceremony in
" law,

* Sub ultima
tempora Regis
H. III.

† This probably
was *Plowden's*
own argument.
Sir J. Burr. sup-
poses he was of
himself that ap-
prentice of the
Middle Temple
who argued for
the defendants.

"law, signifying fully his good will that the
 "thing in the deed should pass from him who
 "made the deed, to the other. And there-
 "fore a deed, which must necessarily be made
 "upon great thought and deliberation, shall
 "bind, without regard to the consideration."

The *voidness* of the consideration is the *same*, in reality, in both cases: the *reason* of adopting the rule was the *same*, in both cases; though there is a difference in the *ceremonies* required by each law. But no *inefficacy* arises *merely* from the naked promise.

Therefore, if it stood *only* upon the naked promise, it's being, in this case, reduced into *writing*, is a *sufficient guard against surprize*: and therefore the rule of *nudum pactum* does not apply in the present case.

I cannot find, that a *nudum pactum* evidenced *by writing* has been ever holden bad: and I should think it good: though where it is *merely verbal*, it is bad. Yet I give *no opinion* upon it's being good, *always*, when in *writing*.

Many of the old cases are strange and absurd: so also are some of the modern ones; particularly, that of *Hayes v. Warren* *. The reason of the reversal of the judgment was, "that it did not appear by the declaration, to
 "be either for the *benefit*, or at the *request* of
 "the defendant."

It is now settled, "that where the act is
 "done at the *request* of the person promising,
 "it will be a sufficient foundation to graft the
 "promise upon."

In another instance, the strictness has been relaxed: as for instance, † burying a son; or ‡ curing a son; the considerations were both *past*; and yet holden good. It has been melting down into common sense, of late times.

However

* Vide 2 Sir
 J. S. 933.

† Church and
 Church's case;
 cited in Raym.
 260.

‡ Vide 2 Leon.
 211.

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However, I do here see a *consideration*. If it be a *departure from any right*, it will be sufficient to graft a *verbal promise* upon. Now here, *White* living in *Ireland*, writes to the plaintiffs "to honour his drafts, for 800*l.* * payable ten weeks after." The plaintiffs agree to it, on condition that they be made safe at all events. *White* offers good credit on a house in *London*, and draws: and the plaintiffs accept his draft. Then *White* writes to them, "to draw on *Van Mierop* and *Hopkins*:" to whom the plaintiffs write, "to inquire if they will honour their draft?" They engage "that they will." This transaction has prevented, stopp'd, and disabled the plaintiffs from calling upon *White*, for the performance of his engagement. For *White's* engagement is complied with: so that the plaintiffs could not call upon him for this security. I do not speak of the money; for that was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon *White* for a performance of his engagement "to give them credit on a good house in *London*, for reimbursement:" so that here is a good consideration. The law does not weigh the quantum of the consideration. The suspension of the plaintiff's right "to call upon *White* for a compliance with his engagement," is sufficient to support an action; even if it be a suspension of the right, for a day only, or for ever so little a time.

* For between *Ireland* and *Holland*, each usance is one month.

But to consider this as a *commercial* case. ALL nations ought to have their laws conformable to each other, in such cases. *Fides servanda est; simplicitas gentium praevaleat. Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed as a rule.

On a question of this nature, "whether by
"the *law of nations*, such an engagement as
"this shall bind?"—The *law* is to judge.

The *true reason why the acceptance* of a bill
of exchange shall bind, is not on account of
the acceptor's having or being supposed to
have effects in hand; but for the convenience
of trade and commerce. *FIDES est servanda*.
An acceptance *for the honour* of the drawer,
shall bind the acceptor: so shall a *verbal* ac-
ceptance. And whether this be an *actual* ac-
ceptance, or an *agreement* to accept, it *ought*
equally to bind. An agreement "to accept a
"bill *to be drawn in future*," would (as it
seems to me) by connexion and relation, bind,
on account of the antecedent relation. And
I see no difference between it's being *before* or
after the bill was drawn. Here was an agreement
sufficient to bind the defendants *to pay* the bill:
agreeing "*to honour it*," is agreeing to *pay* it.

I see no sort of fraud; it rather seems as if
the defendants *had* effects of *White's* in their
hands. And it does not appear to me that
the defendants would not have honoured the
plaintiffs drafts, even though they had *known*
that it was *future credit*.

But whether the plaintiffs or the defendants
had effects of *White's* in their hands, or not;
we must determine on the *general doctrine*.—
And I am of opinion, that there ought to be
a new trial.

Mr. Justice YATES was of the same opinion.
He said it was a case of great consequence to
commerce: and therefore he would give both
his opinion and his reasons.

The arguments on the side of the defendants
terminate in its being a *nudum pactum*, and
therefore void.

This

This depends upon two questions.

1st. Question.—“Whether this *be* a promise *without* a consideration?”

2nd. Question.—If it is, then “Whether this promise shall not be *binding*, of itself, *without* any consideration?”

First,—The draft drawn by *White* on the plaintiffs, payable to *Clifford*, is *no part* of the consideration of the undertaking by the defendants. The draft payable to *Clifford* is never mentioned to the defendants. They are asked, “whether they will answer a draft from the plaintiffs *upon them?*” They answer, “they will honour such a draft *upon them.*”

Whether the defendants had or had not *effects* of *White's* in their hands, is immaterial.

Any * *damage* to another, or *suspension*, or *forbearance* of his *right*, is a foundation for an undertaking, and will make it binding; though *no actual benefit* accrues to the *party undertaking*.

* Vide Coggs v. Bernard. 2 Ld. Raym. 919.

Now here, the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs. It is plain that the plaintiffs would *not* rely on *White's assurance ONLY*; but *wrote to the defendants*, to know if they would accept their drafts? The credit of the plaintiffs might have been hurt, by the refusal of the defendants to accept *White's* bills. They were or might have been prevented from *resorting to him*, or getting *further security from him*. It comes within the cases of promises, where the debtee *forbears suing* the original debtor.

Second question.—Whether, by the *law of merchants*, this contract is not binding on the defendants; *though* it was without consideration?

The *acceptance* of a bill of exchange is an obligation to pay it; the end of their institution, their currency, requires that it should be

so. On *this* principle, bills of exchange are considered, and are declared upon as *special* contracts; though *legally* they are only *simple* contracts: the declaration sets forth the *bill* and *acceptance specifically*; and that thereby the defendants, by the custom of merchants, became liable to pay it.

This agreement, "to honour their bill" was a *virtual* acceptance of the bill. An acceptance needs not be *upon the bill itself*; it may be by *collateral writing*. *Wilkinson v. Lutwidge*. 1 *Strange* 648.

A PROMISE "to accept" is the same as an *actual* acceptance. And a small matter amounts to an acceptance: and so says *Molloy*, *lib. ii. c. 10. §. 20*. And an acceptance will *bind*, though the acceptor has *no effects* of the drawer in his hands; and *without any consideration*. *Symons v. Parminster*, * *Hil. 1747. 21. G. 2. B. R.* And a bill accepted for the honour of the drawer, will also bind.

Then he applied these positions to the present case. It was an acceptance of this very draft, *by relation and connexion*; though the bill was not then drawn by the plaintiffs on the defendants.

But even if it did not amount to an *actual* acceptance, yet it would *equally bind* the defendants; they would be equally obliged to perform the *effect* of their undertaking.

The plaintiffs apprized the defendants of their *intention to draw*; and the defendants promised to "*honour their draft*:" and the plaintiffs, of course, would regulate their conduct accordingly.

Therefore, upon the whole circumstances of this transaction, 1st. There is a consideration:

and

* This was on a motion in arrest of judgment. The judgment was affirmed (ex parte) in Dom. Proc. with 100l. costs, upon or soon after 20th Feb. 1748.

and 2dly. If there was none; yet, in this *commercial* case, the defendants would be bound.

Mr. Justice ASTON. — I am of opinion, “that there ought to be a new trial.”

If there be such a custom of merchants as hath been alledged, it may be *found* by a jury: but it is the *court*, not the jury, who are to determine the *LAW*.

This must be considered as a *commercial* transaction; and is a plain case. The defendants have undertaken “*to honour the plaintiffs draft*,” therefore they are *bound to pay it*.

This cannot be called a *nudum pactum*. The answer returned by the defendants is an admission of “*having effects of White's in their hands*,” if that were *necessary*. And after this promise “*to accept*,” (which is an *implied acceptance*) they might have applied any thing of *White's* that they had in hand, to this engagement: even though *White* had drawn other bills upon them in the *interim*. The defendants voluntarily engaged to the plaintiffs: and they *could not recede* from their engagement.

As to it's being a *nudum pactum* (which matter has been already so well explained) if there be turpitude or illegality in the consideration of a note, it will make it void, and may be given in evidence: but here nothing of that kind appears, nor any thing like fraud in the plaintiffs. Here was full notice of all the facts; a clear apprehension of them by the defendants; a question put to them, “whether they would accept?” and their answer, “that they would.”

Upon the whole, he concurred, “that an action will lay for the plaintiffs against them; and that the plaintiffs ought to recover.”

By the court, unanimously,

The rule "to set aside the verdict, and for a new trial," was made ABSOLUTE.

Goslin v. Wilcock. E. 6 G. 3. C. B. 2 Wilson. 302.

An action lies for suing plaintiff in an inferior court maliciously, and arresting him, when that court had not any jurisdiction of the cause.

Verdict for plaintiff—Motion to set it aside, on the ground that the evidence did not support the declaration—New trial refused, the justice of the case being with the plaintiff, &c.

A new trial was refused, though the declaration was faulty in not alleging that the defendant knew the inferior court had no jurisdiction of the cause.

Special action upon the case, wherein the plaintiff declares, that whereas by the laws of this realm no person ought to be arrested, impleaded or imprisoned without a probable cause of action against him, yet the defendant *falsely and maliciously*, without any *probable cause* of action, in the king's court of record, held at and for the borough of *Bridgewater*, in *Somersetshire*, on the 30th of *September*, 1765, levied a plaint against the plaintiff in a plea of trespass upon the case to the damage of 10 l. and afterwards at the same court, on the same day, sued out upon the said plaint a writ of *capias ad respondendum* directed to the bailiffs of the borough, to take the plaintiff, and have his body before the judges of that court on *Monday* after the service of that writ, to answer the defendant in the said plea; which writ the defendant *falsely and maliciously* caused to be indorsed for bail for 5 l. 3 s. 11 d. against the plaintiff; and the defendant further *falsely and maliciously*, and without any probable cause, afterwards on the 3d. of *October*, 1765, at the said borough, caused the plaintiff to be arrested, and kept in custody 24 hours, without any *probable cause*, when in truth and in fact the defendant had not, at the time of levying the plaint, or of the said arrest and imprisonment, any just or probable cause of action against the plaintiff, for which he ought to have been arrested and imprisoned; and the defendant hath not declared against the plaintiff in that plea, nor further prosecuted his said plaint, but hath discontinued the same, and the said suit is long since ended and determined; and the plaintiff in fact says, that by means of the premises,

premises, he is greatly injured and damnified, and hath been put to great charges in freeing himself from the said imprisonment, and forced to undergo grievous pains of body and mind, and during his imprisonment, was hindered from exercising his lawful employment, trade, and business, and lost the whole profit thereof, at the borough aforesaid: to his damage of fifty pounds. The defendant pleaded *not guilty* of the premises laid to his charge, and thereupon issue was joined.

This cause was tried at the last *Somersetshire* assises, before Mr. Justice *Ashon*, at *Taunton*, when the jury gave a verdict for the plaintiff, and 5 l. damages. The judge reported that it appeared in evidence at the trial, that the plaintiff and defendant both lived at *Taunton*, a quarter of a year together; that the plaintiff was all that time indebted to the defendant in about 5 l. upon a contract at *Taunton*, where the plaintiff appeared publicly, and might have been arrested for the same *there*, at any time; that the defendant said, that if he could not do for the plaintiff at *Taunton*, he would do for him at *Bridgewater*; that afterwards at the fair at *Bridgewater*, when the plaintiff was standing at his stall *there*, exposing his goods to sale, the defendant came along with the bailiffs to the stall, and said to the bailiffs, *there is the rogue, there is your prisoner*; whereupon they instantly arrested the plaintiff in the fair: the *plaint* levied, and the *capias* indorsed for bail were also proved; there was likewise evidence of the injury the plaintiff suffered, and the expences he was put to, on this occasion. There was not any witness called for the defendant, but it was admitted that he discontinued his action in the borough, when

he knew it would not lie there, and that he brought another action against the plaintiff, for what he owed him, and had got a verdict at that assizes for the same; so that there really was a debt owing by the plaintiff to the defendant, at the time the plaintiff was arrested at the suit of the defendant, in the borough-court of *Bridgewater*; though it was not contracted within that jurisdiction: but the judge was of opinion, that the arrest *there* at the time of the fair, was done *maliciously*, and was satisfied with the verdict.

A motion was made for a new trial, because the evidence did not support the declaration, (with leave given to the defendant at the same time to move in arrest of judgment in case he should not succeed in this motion;) it was objected, that the gist of this kind of action is *malice*; as where a man *maliciously* arrests another, when there is really *no debt* at all owing, or where one maliciously arrests another, for a far larger sum than is really due, with an intent to oppress him, and prevent his friends from being bail for him; but the *malicious intention* must clearly be made to appear, and must be expressly averred in the declaration. In the present case it appears there was really and *bonâ fide* a debt of 5 l. and upwards owing from the plaintiff to the defendant, at the time of the arrest at *Bridgewater*; and that the defendant not knowing but that he might lawfully sue plaintiff *there*, caused him to be arrested there; but as soon as he was informed that court had no jurisdiction, he discontinued his action, and brought another in a superior court, and has recovered: so there appears no malice in the case. 2dly, It was objected that an action will not lie either against the judge,

judge, officer, or party, for arresting a man in an inferior court, when there is no cause of action within that jurisdiction; and the case of *Temple v. Killingworth*, *B. R. Hil. 2 W. & M. Rotulo* 725. *Carth.* 189. 1 *Show.* 254. *S. C.* 12 *Mod.* 4. *S. C.* was cited as in point, where in the plaintiff declared thus, *viz.*

“ Petrus Temple queritur de Samuele
 “ Killingworth in custodia marescalli mares-
 “ caltiæ, &c. pro eò videlicet quod prædic-
 “ tus Samuel machinans & malitiosè inten-
 “ dens eundem Petrum magnoperè prægra-
 “ vare & minùs justè opprimere 25 die A-
 “ prilis, anno regni domini regis & dominæ
 “ reginæ nunc primo, injustè & malitiosè
 “ apud London prædictum in parochia, &c.
 “ in warda, &c. prætextu & colore cujusdam
 “ prætensæ querelæ in curiâ dictorum domini
 “ regis & dominæ reginæ ad tunc tenta co-
 “ ram Johanne Flint, milite, tunc uno vice-
 “ comitum civitatis Londini prædicti, in com-
 “ putatorio suo scituato in parochia & warda
 “ prædictis, intratæ & levatæ ad sectam ip-
 “ sius Samuelis super quandam prætensam
 “ actionem ad magnum prætensam damnum
 “ ipsius Samuelis arrestari & imprisonari ibi-
 “ dem causavit & procuravit, ac prædictum
 “ Petrum in prifona & custodia ibidem, rati-
 “ one arrestationis prædictæ, per magnum
 “ tempus scilicet per spatium sex dierum de-
 “ tineri fecit, pro defectu sufficientium manu-
 “ captorum & securitatis ad prætensam actio-
 “ nem prædictam pro prædicto prætenso
 “ damno; ubi re verâ & in facto prædictus
 “ Samuel tempore arrestationis & imprifona-
 “ menti ipsius Petri prædicti ut præfertur,
 “ vel ad aliquod tempus antea, nullam ha-
 “ buit causam actionis versus præfatum Pe-
 “ trum

“tum infra jurisdictionem ejusdem curiæ,
 “ratione quorum quidem injustè malitiosè
 “arrestationis & imprisonamenti prædicti ip-
 “sius Petri, ipse idem Petrus non solum in
 “prisona & custodia per totum tempus præ-
 “dictum detentus, & de libertate sua depri-
 “vatus fuit super prædictam prætensam ac-
 “tionem ob prætentum damnum prædictum;
 “verum etiã magnos labores & expensas
 “pro relaxatione sua ab arrestatione & im-
 “prisonamento illius erogavit ac subire & ero-
 “gare compulsus fuit, unde dicit quod de-
 “terioratus est & damnum habet ad valen-
 “ciam quingentarum librarum, & inde pro-
 “ducit sectam, &c.”

The defendant pleaded the general issue *not guilty*, and there was a verdict for the plain-
 tiff. It was moved in arrest of judgment, that
 the plaintiff (when he was defendant below)
 ought to have pleaded to the jurisdiction of
 the sheriffs court, and if the plea had been re-
 fused, then a prohibition would have been
 granted; the court inclined to that opinion,
 and judgment was stayed 'till the plaintiff
 should move it again; and afterwards the
 plaintiff moved for judgment, and the cases
 in * the margin were cited to maintain the
 action; but the court was not satisfied with
 the action. There does not appear any judg-
 ment entered upon the roll. In *Shower* 254.
S. C. Holt, C. J. said the point was fit to be
 considered by all the judges; and in 12 *Mod.*
 4. *S. C. Holt*, C. J. said that of late it is held
 that *case* will not lie for prosecution in an in-
 ferior court, where the court has not jurisdic-
 tion; that the first case in point was at
Huntingdon assizes, and referred to the *C. B.*
 and there adjudged, that for suing one with-
 out

* *Hob.* 105.
Cro. Jac. 667.
Cro. El. 628,
 636. Stat.
 3 *Ed. 1.* cap. 38.
Regist. 98.
F. N. B. 45. (F)
 1 *Sand.* 221.
Sid. 463. 4 *Rep.*
 14. b. 1 *Vent.*
 369.

out any cause of action at all, no action lies, unless it appears to be with a *malicious* and *vexatious* design; eight of the judges seemed to think the action would not lie.

It was answered by the counsel for the plaintiff, that it appears by the judge's report, in this case at bar, from the time, place, and every circumstance attending the arrest at *Bridgewater*, that it was done with a *malicious* design to injure the plaintiff in the sale of his goods at the fair, and to expose him to his customers; the defendant must certainly know, that the borough-court at *Bridgewater* had no jurisdiction, and his discontinuing the action, after he had executed his malicious design, will not avail him; and 2dly, That it is a rule in law, that wheresoever a man suffers an injury, joined with a loss, the law shall give him a remedy and recompence, *Hob.* 45. and no remedy or satisfaction can be had in this case, unless this action will lie; for false imprisonment certainly will not lie. *Gwinne v. Poole & al.* 2 *Lutw.* 935. 1571, 1572. And that an action will lie for suing in an inferior court, without any cause of action within the jurisdiction was held good, was cited, 2 *Shower.* 328. *Hudson v. Cooke.*

In reply to the case of *Hudson v. Cooke*, was cited what Sir John Powell said in his learned argument in the case of *Gwinne v. Poole*, 2 *Lutw.* 1571, 2. in regard to the case of *Hudson and Cooke*: "I was present," (says he,) "when the case of *Hudson and Cooke* was adjudged: it was an action upon the case, brought against the defendant, for commencing an action in an inferior court, where the cause of action arose out of the jurisdiction of that court; not guilty was pleaded,

“pleaded, and a verdict for the plaintiff;
 “and an exception was taken in arrest of
 “judgment, for that it was not shewn that
 “the defendant knew that the place where
 “the action arose, was out of the jurisdiction:
 “but it was held by *Jefferys, Holloway* and
 “*Walcot*, that it was aided by the verdict;
 “*Withens* Justice being of a contrary opinion:
 “I confess, says he, that I then thought it
 “strange that the *gift* of the action should be
 “aided by the verdict:” therefore the defend-
 ant’s counsel insisted this case of *Hudson and*
Cooke is not law.

Lord Camden: Baron Powell, in his argu-
 ment of *Gwinne* and *Poole*, has stated the learn-
 ing of cases of this kind, but hath not laid
 down any precise rule of law: this is a nice
 case, and is to be looked into with precision.
 There are no cases in the old books of actions
 for suing where the plaintiff had no cause of
 action; but of late years, when a man is *ma-*
liciously held to bail, where nothing is owing,
 or when he is *maliciously* arrested for a great
 deal more than is due, this action has been
 held to lie; because the costs in the cause are
 not a sufficient satisfaction for imprisoning a
 man unjustly, and putting him to the difficulty
 of getting bail for a larger sum than is due.
 Whenever this kind of action is brought, the
 particular *gravamen* must be alledged in the
 declaration, and it must be laid that it was
 done *maliciously, and with an intent to injure*
and oppress. The fact of the evidence in the
 present case is, that the defendant at *Bridge-*
water said, “I know I can catch you here,
 “though I could not at *Taunton*,” but this
 doth not prove that he might not think that
 the action would lie at *Bridgewater*; and it

seems to me that he did not know to the contrary when he levied his plaint; because as soon as his attorney informed him that it would not lie *there*, he discontinued his suit. I think the declaration is ill, because it is not alledged in the declaration, that the defendant knew that the place where the cause of action arose, was out of the jurisdiction of the borough-court of *Bridgewater*, and that the case proved at the assizes, is different from the case stated in the declaration: and if it be so, we ought to grant a new trial.

Clive Justice: This is the first action of the kind I have ever seen brought for suing in an inferior court which has not jurisdiction; and I am inclined to think the declaration will not support the evidence.

Bathurst Justice: This is a motion for a new trial, as being a verdict against evidence: I cannot help agreeing with the judge who tried this cause, that the arrest at *Bridgewater* was *maliciously* done; it then comes to this question, whether an action upon the case will not lie for suing in an inferior court which has not jurisdiction, with the circumstances of *malice*, which manifestly appear; and I am very clear that it will lie, but think this declaration is not rightly drawn: it ought to have alledged that the defendant knew that the cause of action did not arise within the jurisdiction of the court at *Bridgewater*, and then it would have been right enough. But the court can see, in this case, that justice and equity are with the plaintiff, and they will never grant new trials, where the verdict is on the honest side of the cause. The case of *Smith v. Page*, 2 Salk. 644. is a very strong case to this purpose: in ejectment, the plain- Vide post V.
tiff

tiff was a mortgagee, and claimed by surrender, whereas the land was not copyhold, and the defendant claimed only by a voluntary conveyance: the verdict was for the plaintiff, and the court of *B. R.* would not set it aside, and grant a new trial against the honesty of the cause. So in the present case, I think the honesty of the cause is with the plaintiff, and therefore I am for supporting the verdict if possible. When a defendant has got a verdict in a hard action, the court will not grant a new trial, and in many cases, as in *qui tams*, no new trial is ever granted, where the defendant has got a verdict.

Gould Justice: I am of the same opinion with my brother *Bathurst*, as to the malice in the defendant, and the justice of the plaintiff's case, and think the defendant was conscious that he had no right to arrest the plaintiff at *Bridgewater*; and the court will *be astute* to support this verdict, as they see it is on the side of justice, and will not grant a new trial. I am inclined to think this declaration is well enough, for it is alledged, *That the defendant maliciously, without any probable cause, at the said borough, caused the plaintiff to be arrested; when in truth and in fact the defendant had not at the time of the levying the plaint, or of the arrest and imprisonment, any just or probable cause of action, for which he ought to have been arrested and imprisoned.*

I think this is a substantial disclosure and allegation of his cause of action, and was sufficient notice to the defendant, to come with proof, and shew at the trial that he had a cause of action, arising within the jurisdiction of the court at *Bridgewater*; and that the plaintiff in his declaration was not obliged to aver,

that

that the defendant knew that his cause of action did not arise within the jurisdiction of that court, for this is matter of evidence, which no man is obliged to set out in his pleadings. As at present advised, I think this declaration is substantially good: but supposing it is not, yet in such a case as this, we ought not to grant a new trial.

The court being divided, took time to consider; and afterwards, in this same term, Lord *Camden* and Mr. Justice *Clive* agreed in opinion with Mr. Justice *Bathurst* and Mr. Justice *Gould*, to refuse a new trial.

Lord *Camden*: I think, upon further consideration, that as the justice and equity of the cause is on the side of the verdict, we ought not to grant a new trial. I shall always be willing to grant a new trial, where the equity and justice of the case is with him who prays it, if the law and circumstances of the case will permit; and shall be as willing to refuse a new trial, where I am warranted to do so by precedents. The granting new trials began within the time of memory, and I will not extend the practice of granting them further than precedents have already gone. This is an action for bringing a suit at law; and courts will be cautious how they discourage men from suing; where a party has been maliciously sued and held to bail, malice, and that it was without any probable cause, must be alleged and proved. Upon more mature consideration, we are all now of opinion, that if you hold a man to bail in an inferior court, when you know it hath not jurisdiction, and with malice, an action upon the case will lie. And that if the plaintiff had averred, that the defendant knew that his cause of action

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did

did not arise within the jurisdiction of the court of *Bridgewater*, we are all clear of opinion the declaration would have been good; *that single averment*, together with *malice*, would have been sufficient without any other. The plaintiff and defendant lived in the same town of *Taunton*, a quarter of a year together, and the defendant (to whom he was indebted all that time,) never sued him there, (though it is not pretended but the plaintiff always appeared publicly,) but the defendant follows him to *Bridgewater*, and abuses him *there* publicly, and arrests him in the fair at his stall, when the defendant must know that the court *there* had no jurisdiction; we are forced to say the verdict is according to the justice of the case, and on a motion for a new trial we are desired to grant it for a fault in the declaration, against the justice of the case; but if I had only the case of *Deerly v. the dutchess of Mazarine*, 2 *Salk.* 646. to warrant me (though the jury were liable to an attain in that case,) I would not grant a new trial in the present case.

Vide post V.

So a new trial was refused by the whole court.

Swain v. Hall,
H. 10 G. III.
3 Wils. 45-
A new trial was
refused, though
the Chief Justice
reported that the
strength of the
evidence was
against the ver-
dict; the jury
being the legal,
constitutional
judges of the
fact.

Covenant upon a lease made by plaintiff to defendant, of a house called the *Oxford-arms*, for the term of twenty-four years, in consideration of 670 l. in hand paid by defendant to plaintiff, and of the yearly rent of 142 l. wherein the defendant (amongst others things) covenanted to lay out 400 l. in repairing the premises, and also covenanted to keep and leave the same in good and tenantable repair, at the end of the term. Whereupon the plaintiff assigned two breaches; 1st, That the defendant did not lay out 400 l. in repairing the premises; 2dly, That the defendant did not

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leave the same in good and tenantable repair, at the end of the term. The defendant pleaded, that he did lay out 400*l.* in repairing the premises, and thereupon issue was joined; he also pleaded that he did leave the premises in good and tenantable repair, at the end of the term, and thereupon issue was also joined.

Upon the trial before Lord Chief Justice *Wilmot*, upon the first issue it was clearly proved, on behalf of the defendant, that he had laid out 400*l.* in repairing the premises, so that the counsel for the plaintiff wholly gave up that issue; as to the second issue, it seems there was a contrariety of evidence; and the Chief Justice, in summing it up to the Jury, was pleased to intimate to them, that he thought the weight of evidence was with the plaintiff; but they found a verdict for the defendant upon both issues.

Serjeants *Davy* and *Burland* for the plaintiff moved for a new trial, upon this ground, *viz.* that, as to the second issue, the verdict was against evidence; for that in fact there was no direct or positive evidence given on the side of the defendant, that he left the premises in good and tenantable repair at the end of the term, and they appealed to the Lord Chief Justice's notes: whereupon the court made a rule to shew cause why there should not be a new trial.

Upon shewing cause, the Chief Justice made his report; after stating the two issues as above, he laid the first entirely out of the case, as being clearly with the defendant. As to the second issue, he said, the plaintiff called and examined three witnesses.

Mr. *Flight*, the first witness, said he was a surveyor; that in *April* last, a day or two after old *Lady-day* 1769, when the lease expired, he surveyed the house and premises in question; that he found the roof much out of repair; that it rained in; that there were ten loads of rubbish in the garrets; that there was no sell, nor any glass in some of the windows; and that the premises were not left in tenantable repair; but he made no estimate how much it would cost to put the same into such tenantable repair, as a tenant after a lease of twenty-four years ought to have left the same.

The second and third witnesses for the plaintiff were *William Smith* and — *Wood*, two surveyors, who said, that in *April* last, about the end of the said term of years, they surveyed the premises together, and made a particular estimate in writing, and signed it, how much it would cost to put the premises in such tenantable repair as the defendant ought to have left the same, which they estimated at 105 l. 18 s. 9 d. and said that was a fair estimation between a landlord and a going-out tenant; that they were employed to survey on the part of the plaintiff; that the defendant, *Hall*, was present, and refused to employ a surveyor on his side; but that if they had been employed by him, they should have made the same estimate: they exactly agreed in their account of this matter. This is the whole of the evidence for the plaintiff.

For the defendant two witnesses were called. Mr. *Frazier*, the first witness, said he was a surveyor, and was employed to survey this house; he swore he thought, that at the time of the defendant's quitting it, at the expiration of the lease, it was in tenantable repair: his very

words were, "That according to the best of his judgment, he should have been obliged to a tenant to have left a house of his so well, and could not expect to have one left in better repair." He said, "that there was a great difference between repairs as to a tenant's going out, and a tenant's coming into a house."

Mr. *Somerton*, the second witness for the defendant, swore that he was a surveyor; that he was recommended to the defendant *Hall*, to survey the premises, in order for *Hall* to take a new lease; that he did make a general survey, and was in every room in the house; and said, upon the whole, that he thought the landlord should have been contented; that if he had been the landlord he should have been contented with the condition the premises were left in when *Hall* quitted the same. The Chief Justice said this was a very fair and candid witness; that he gave both *Wood* and *Smith*, the plaintiff's witnesses, very good characters; said that *Smith* was a man of knowledge and capacity; and that *Flight*, the first of the plaintiff's witnesses, was an eminent man in his business.

This is the whole of the evidence as to the second issue. Whereupon the Chief Justice said, he still thought the weight of evidence was on the side of the plaintiff; but notwithstanding his opinion, after hearing Serjeants *Nares* and *Leigh* for the plaintiff, and Serjeants *Davy* and *Burland* for the defendant, there being evidence on both sides, the court refused to grant a new trial. The Chief Justice spoke to the following effect:

WILMOT, Chief Justice. Where verdicts have been given contrary to evidence, or where

there hath been no evidence at all to support such verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge before whom the cause was tried hath been of opinion, that the strength and weight of evidence was against the verdict. In the present case, there was a contrariety of evidence on both sides; and although I am still of opinion, that the weight of evidence was with the plaintiff, yet I disclaim any power to controul this verdict of the jury, who are the LEGAL CONSTITUTIONAL JUDGES of the fact.

N. B. Some days after the court refused a new trial in this case, the chief justice said, that it could not have been sent to be tried again upon one of the issues, but it must have gone back on the whole record; viz. upon both the issues; and that one issue being clearly with the defendant, there was no foundation or pretence for a new trial on that issue; and he cited the case of *Rowland v. Vanbalken*, *C. B. Easter term, 1 Geo. I.* from *J. Tracey's* notes, where it was so determined.

Norris v. Tyler.
E. 14. Geo. III.
B. R. Cowp. 37.
In an action for
a malicious pro-
secution, verdict
in favour of the
defendant re-
fused to be set
aside, though
against evidence.

This was an action for a malicious prosecution, in preferring a bill of indictment against the plaintiff, for forging a note of hand. Four witnesses were called to prove that the handwriting was not the plaintiff's, and the judge directed the jury in his favour: but the jury found a verdict for the defendant. Upon a motion for a rule to shew cause why the verdict should not be set aside, as being a verdict against evidence, and a new trial granted, the court said the defendant had been sufficiently tried once, where the suit was of a criminal nature. Motion denied.

Assumpsit upon a note of hand for 51. 7 s. by payee against drawer. Plea the general issue. This cause was tried at the last assizes for Kent.—Plaintiff only proved the defendant's hand-writing.—Defendant, by two witnesses, proved the consideration to be smuggled goods: yet the jury found for the plaintiff.

Morgan obtained a rule to shew cause why there should not be a new trial, without costs.

Serjeant *Bond* and *Adam* shewed cause.—The court made the rule absolute for a new trial, without costs.

To an action on a policy of insurance, tried before *Buller*, J. at the sittings at *Guildhall*, after last *Trinity* term, the defendant pleaded the general issue, and *paid money into court*. A verdict having been found for the plaintiffs, a new trial was moved for on the grounds that this was a verdict against evidence; and that upon the construction of the 25 G. III. c. 44. the plaintiffs could not support this action in point of law, the name of *Shultz* not being inserted in the policy. After argument, the court took time to consider of the case: and on this day,

ASHURST, J.—delivered the opinion of the court.

This is an action on a policy of insurance, made in the name of *Lyon De Simons* on goods and jewels on board the *Halfwell* from *London* to the *East-Indies*.

This policy was made on the 23d *December* last; which being long subsequent to the passing of the statute 25 Geo. III. the policy cannot by law be applied to any goods which were not the property of *De Simons*, or which he was not interested in (a) but the plaintiffs have endeavoured to make another use of it, and to apply it not only to the goods which were

Tamplin v. Vorse. E. 28. G. III. B. R. Verdict against law and evidence. Consideration of a note, smuggled goods. Yet jury found for plaintiff.

Cox and another, Exors. of Shultz, against Parry. M. 27. G. III. Durn. and East, 1 V. 464.

Payment of money into court is only an acknowledgment by the defendant that the plaintiff is entitled to recover the sum so paid: but it does not preclude him from taking any objection to the action beyond that sum: tho' unless such sum were paid, such objection would be a bar to the plaintiff's action. According to the 25 G. III. c. 44. the name of the party interested must be inserted in a policy of insurance: otherwise he cannot recover upon it.

(a) Vide *Durnford and East*. 1 V. 313. *Pray and Edic*.

shipped in the name of *De Simons*, but also to goods shipped in the name of *Shultz*. And in order to do that, they proved on the trial that *Shultz* ordered two policies to be made, one in the name of *Shultz* on goods and jewels for 1,400 l. the other (which is the policy in question) in the name of *De Simons*, to the amount of 1,600 l. on goods and jewels; which policy was to be lodged in the hands of *De Simons*, as a security for 1,600 l. which *Shultz* had borrowed of him. When *Shultz* borrowed the money of *De Simons*, he assigned over to him the jewels which were shipped in the name of *De Simons*, and they were to be re-delivered to *Shultz* in the *East-Indies*, upon his paying the principal and interest there. The jewels shipped in the name of *Shultz* are totally lost, but those shipped in the name of *De Simons* have been recovered. If the plaintiffs can apply the policy to the goods shipped in the name of *Shultz* (as well as to those shipped in the name of *De Simons*) there has been an average loss, and the verdict which the plaintiffs have obtained ought to stand. If it cannot be so applied, the underwriters are liable only for the salvage of the jewels shipped in the name of *De Simons*; and, more having been paid into court, the verdict is wrong.

I have already stated, that by law the policy can only be applied to the interest of *De Simons*, the statute having made it void to other purposes.—But a great question in the case is, whether the defendant has not precluded himself from making that objection by paying money into court, therefore it will be necessary to see what effect paying money into court has in the cause.

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It admits that the plaintiffs have a right to maintain the action (a)* and reduces the question simply to the *quantum* of damages, which they are entitled to recover.

(a) Vide Elliott
v. Callow.
2 Salk. 597.

In this case, if the defendant had not paid money into court, the plaintiffs must have been non-suited, for the executors of *Shultz* could not have recovered on a policy made in the name of *De Simons* only: but as the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action on the policy *to the amount of that sum*: but he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that extent.

The question still remains, whether upon this contract the plaintiffs are entitled to more. In order to ascertain that, it is incumbent on the court to examine and expound what the contract is. At the time it was made, it could only be good as an insurance on the goods which belonged to *De Simons*; it is made in his name; it is a good and valid contract, as far as it respects his goods; but is void as to all others. And the plaintiffs shall never be admitted to say that this contract, tho' apparently legal, is in fact illegal, as being made for their benefit; and yet they mean to avail themselves of that illegality, and to recover damages upon it.

Besides this, we think that, (independant of the objection in point of law), the verdict is not supported by any fact of the evidence. The broker's evidence does not by any means prove that *Shultz* did not intend to make

distinct policies upon the distinct goods shipped in his own name, and that of *De Simons*.

On the contrary, the making of two policies, each according to the value of the goods which were shipped in their respective names, and the purposes for which that was done, namely—to lodge one in the hands of *Shultz*, and the other in the hands of *De Simons*, and the impossibility that they should by law take effect in any other way than as specific policies on the specific goods (which we are bound to presume *Shultz* knew) are unanswerable proofs, that he intended that the policies should have the effects which the law gives them.

The defendant underwrote the policy made in the name of *Simons* only; and it does not appear that he knew or even heard of the other policy which was made in the name of *Shultz*. Then the evidence of one of the witnesses stands wholly uncontradicted, and he says that *De Simons* (who is one of the plaintiffs) told him that this policy was made on the particular jewels shipped in his name.

On the whole, we are of opinion, that this is a verdict both against law and against evidence; and therefore must be set aside.

Turner and others, v. Pearte. E. 27. G. III. B. R. Durnf. and East. 1 V. 717.

An objection to the competency of witnesses discovered after a trial, is not a sufficient ground of itself for granting a new trial: but it may have some weight with the court where the party applying appears to have merits.

This action was brought for withdrawing suit from the mill of the plaintiffs, situated within the manor of *Leeds*, which suit they claimed as lords of the said manor. The defendant, at the trial before Mr. Baron *Perryn*, at the last assizes at *York*, set up an exemption as being situated within the manor of *Whitkerk cum membris*, which was part of the possessions of the knights of *St. John of Jerusalem*, the tenants of which manor had always been exempt from doing suit to the mill of the lord of the manor of *Leeds*. It appeared that the

manor

manor of *Whitkerk* extended into the manor of *Leeds*, and the defendant brought evidence to prove that the houses in respect of which this exemption was claimed were situated within that part of *Whitkerk*, and were distinguished by the mark of a cross. The jury found a verdict for the defendant; and a new trial was moved for, this term, upon two grounds; *first*, that it was a verdict against evidence. *Secondly*, upon an affidavit, that it had been discovered since the trial, that five out of nine of the witnesses on the part of the defendant, were interested in the event of the cause, and therefore were incompetent, and ought not to have been received. The ground of their incompetency was stated to be, that they contributed towards the relief of the poor of *Leeds*, and that the overseers of the poor had contributed twenty guineas towards carrying on this suit in respect of the workhouse, which was one of the *St. John's* houses, and claimed a similar exemption. In answer to this, an affidavit was made by those witnesses, that they did not know of this subscription at the time they gave their testimony.

Cockell Serjeant, *Wood* and *Topping*, shewed cause against the rule; and as to the second objection, they contended that it came too late, even if it were intitled to any consideration at all: for in strictness no person could be objected to as an incompetent witness, after he had been sworn in chief. In *Abrahams* and *Burn*, (a) where a witness was not objected to till after his examination, Lord *Mansfield* said, ^{2252.} (a) 4 Burr. " in strictness, the objection comes too late
" after he has been sworn in chief, examined,
" and cross-examined. The strictness of law,
" in this respect, is very wise, and ought to
" be

" be adhered to, for the relaxation may be abused, and must always occasion a waste of time." But at all events, supposing the objection could be gone into, some of the most material witnesses did not know that the houses to which they belonged did contribute towards the general fund at the time that they gave their evidence: so that all objection, in point of interest, is entirely done away from them, and there were others who had no interest whatever.

Chambre and *Law*, in support of the rule. If a witness has an interest in the cause, however small or remote, that will render him incompetent. Here the witnesses not only claimed a similar exemption in respect of the poor-house, but likewise contributed to the defence of this action. In the case of *Abrabams* and *Bunn*, Lord *Mansfield* was only stating what had been the ancient doctrine in respect to witnesses; and he certainly did not intend to recognize it in its fullest extent, for he says that it had been relaxed in modern times, and, in that instance too, he held the witness to be competent; therefore it was decided on another ground.

The counsel on each side also argued this case upon the merits; as to which, the court being of opinion, that the weight of evidence was in favour of the verdict, they also discharged the rule on that ground; but they first gave their opinions upon the other point.

ASHHURST, J.—The regular time for objecting to the competency of witnesses is at the trial. The ancient doctrine on this head was so strict, that if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that

that strictness may in some degree be relaxed by the custom of suffering witnesses to be examined conditionally, which is only waving the objection for the time. But still the objection must be made at the trial. Besides the affidavit on the part of the plaintiffs is answered as to the bias which might be supposed to be on their minds, for they swear that they did not know of any subscription at the time of giving their evidence.

BULLER, J.—There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested; and I should be very sorry to make the first precedent.

Anciently, no doubt, the rule was, that if there was any objection to the competency of the witness, he should be examined on the *voir dire*; and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court, and it is for the furtherance of justice. The examination of a witness, to discover whether he is interested or not, is frequently to the same effect as his examination in chief: so that it saves time, and is more convenient, to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection. But there never yet has been a case in which the party has been permitted *after trial* to avail himself of any objection, which was not made at the time of the examination; but in the present case there

is

is not the least foundation for this court to interpose; for it cannot be said, that the witnesses were swayed by this interest in the least degree. I do not say that it might not have been a ground to object to their testimony on the trial, supposing the whole of what was suggested by the plaintiff was true: but it would have been necessary to have determined another question first; whether the houses, in respect of which the witnesses are supposed to be interested, were really houses formerly belonging to the knights of *St. John of Jerusalem*, before any decision could have been made on their competency; but at any rate we will not permit them to make the objection now. Where it appears that one or more material witnesses who were examined on a trial were interested, it may afterwards weigh with the court as a circumstance for granting a new trial, provided the merits of the case are doubtful; but as a substantive objection, I am clearly of opinion that it ought not to be allowed.

GROSE, J.—As to the competency of the witnesses, it is not contended that in point of law we are bound to reject their testimony now. This then is an application to our discretion; and the question is, whether that should induce us to reject their evidence after verdict. If this objection had been made before me at the trial, perhaps I might have admitted it: but then by the rule of law, objections of this nature must be made at the trial. And if the plaintiffs will insist upon the strict rule relative to the incompetency of witnesses, the defendant has an equal right to avail himself of the rule that the objection now comes too late. Formerly the rule was to examine on the *voir dire*; that indeed has been relaxed:
but

but this application requires us to go farther; and the affidavit states no sufficient grounds in support of it.

In the first place, it does not clearly appear, that the plaintiffs did not know of the objection at the time of the trial. It is sworn very loosely; and if they knew of it at that time, that would be a decisive reason for refusing to allow it now. However, although no new trial has ever been granted on such an objection, I do not know but that, if a proper affidavit were made, it might have some influence on my mind, where the party applying has merits; but here the weight of the evidence is in favour of the verdict.

Rule discharged.

V. A Verdict against the Record, or against Law, but new Trial not granted against the Equity of the Cause.

Maby v. John
Shepherd, extor.
of Edmund
Shepherd. T.
20. Jac. B. R.
Cro. Jac. 640.
Palm. 286. S. C.
Godb. 283. S. C.
Debt upon obli-
gation by Ed-
mund S.
Oyer. Bond sub-
scribed Edmund,
the true name,
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ward in the ob-
ligation, non est
factum testa-
toris.
Jury found it the
deed of Edmund.

Debt upon an obligation for 40 l. by *Edmund Shepherd*: the defendant demanded oyer of the deed, and of the condition, which was entered *in hac verba*; *noverint universi pro presentes me EDWARDUM teneri, &c.* in 40 l. And he subscribed it by the name of *Edmund Shepherd*, which was his true name; the defendant pleaded *non est factum testatoris*. The jury found that it was the deed of the said *Edmund Shepherd* the testator. And now it was moved, that notwithstanding the verdict is found for the plaintiff, yet the judgment ought to be given against the plaintiff: for he declares upon a bond by *Edmund Shepherd*, and shews a bond of *Edward Shepherd*, which is another person; and they never were the same, but distinct names. And although it be subscribed by the name of *Edmund*, yet it is no part of the bond; which being apparent to the court, the plaintiff cannot have judgment, but ought to be barred; and of that opinion was the whole court. And although the jury hath found it to be the deed of the said *Edmund*, yet that will not help it, but he ought to have brought his action according to the bond: wherefore

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it was adjudged, *quod quærens nihil capiat per billam*. Vide *Dyer* 279. *Shotbolt's case*, and *Watkins and Oliver ab Colver Cro. Jac.* 558. Judgment quod quærens nil capiat, &c.

In ejectment, the plaintiff was a mortgagee, and claimed by surrender, whereas the land was not copyhold, and defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the court could not set it aside, and grant a new trial, against the honesty of the cause.

Smith v. Page,
M. 8. W. 111.
B. R. Salk. 644.
No new trial
against the equity
of the cause.

Upon *non assumpsit* pleaded, the jury found for the plaintiff, tho' the dutchess gave good evidence of her coverture; and the court would not grant a new trial, because there was no reason why the dutchess, who lived here as a *feme sole*, should set up coverture to avoid the payment of her just debts.

*Deerly v. the
Dutchess of Ma-
zarine*. Hill. 8,
Will. III. B. R.
Salk. 646.
New trial not
granted, for mis-
take in point of
law, against the
honesty and equi-
ty of the cause.
Vide ante.

TRESPASS *quare clausum fregit*. The defendant pleaded, 1st. Not guilty. 2dly, He prescribed for a certain way, leading from a *common highway* in *Birkin*, into, through, and over the plaintiff's closes, in which, &c. The plaintiff by his replication traversed the prescription, whereupon issue was joined. At the trial of this cause, the council for the defendant, having admitted the trespass, called ten witnesses, who clearly proved the defendant's right of way. But it appeared upon the evidence that this way did not lead from a *common highway*, but did lead from a certain *private way* in *Birkin*; whereupon it was objected at the trial, that the defendant had not proved his prescription to the way, it being laid in his plea that the *terminus a quo* was from a *common highway*, whereas the proof was, that it was from a *private way*; but the right to the way over the plaintiff's closes, in which, &c. being clearly proved, Mr. Justice Gould, before whom the cause

*Sampson, v. Ap-
pleyard*. M. 12.
G. III. C. B.
3 Wils. 272.
In trespass defend-
ant prescribes
for a way over
the close, in
which, &c. and
mistakes the ter-
minus a quo, in
his plea: verdict
for the defend-
ant. The court
refused to grant
a new trial, the
merits having
been tried.

cause was tried, left it to the jury (nine of which jury had a view) who found a verdict for the defendant for his right of way.

And now Serjeant *Leigh* for the plaintiff moved for a new trial, objecting that the defendant had failed in proving the prescription, as laid in his plea; that the *termini à quo*, and *ad quem* over what land ought to be laid, and proved with the utmost certainty. That here the *terminus à quo* was laid to be a *common highway*, but was proved to be a *private way*; and he cited *Lit. Rep.* 295.

Palmer 420.

Serjeant *Burland* for the defendant.—The merits of this case have been tried, and the courts do not grant new trials for any little slip in pleadings, where they see that the merits have been tried; but I submit it to the court, that the *terminus à quo* is not a material part of the *prescription*; the defendant is called upon in this action to shew his right of way over the place in which, &c. he pleads that he has *that* right by *prescription*; the material part of which *prescription* is confined to the *locus in quo*. The plaintiff could not have replied that the *terminus à quo* was from a *private way*, *absque hoc*, that it was from a *common highway*, because the merits could not have been tried upon an issue taken on *that traverse*.

Lord Chief Justice *De Grey*.—This is a motion for a new trial, because the defendant, in his plea, has mistaken one abuttal of the *way*; if a new trial was to be granted, the defendant would amend his plea, according to the evidence, and would have another verdict, in all human probability, having given such clear proof of his right by many witnesses.

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Upon this record, it is certain that the defendant was bound to prove his right of way as it is pleaded; he has proved it to a common intent; the *terminus à quo* is pleaded to be a *common highway*, (it is not described to be the king's highway,) and a *common highway* may be a *private way* in common sense and understanding; however, the merits have been tried, and therefore a new trial ought not to be granted.

Nares Justice.—I am of the same opinion; and the court never grants a new trial, when they clearly see the merits have been fairly and fully tried.

Gould Justice.—I am of the same opinion; and that in pleading a right of way, you need not describe the *terminus à quo*, because the plaintiff may reply *extra viam*, which will be a matter for evidence.

New trial refused *per totam curiam*.

This was an action, brought by the indorsees, upon *two foreign bills of exchange*, drawn by colonel Clive, then in the *East-Indies*, upon the *East-India* company, and accepted by them, payable to Mr. Campbell or order, then also in *India*, and indorsed by Mr. Campbell to Mr. Robert Ogilby. One of these bills was by such indorsement directed to be paid to *Robert Ogilby or order*, in the usual way of indorsing; and no dispute or question arose upon it. The other bill was also indorsed by Mr. Campbell to *Robert Ogilby*; but the words, "*or order*," were originally OMITTED in *this indorsement*, and afterwards put in, by another hand, before the trial.

These bills, *thus* indorsed by Mr. Campbell to Mr. Ogilby (without adding the words *or order* in the indorsement of the latter) were

Edie and another
v. East-India
Company.

T. 1 G. III.

B. R. 2 Burr.

1216.

Verdict for the
plaintiff on one
count, right;
for the defend-
ant on the se-
cond, wrong;
evidence of usage
contrary to set-
tled law having
been admitted,
new trial granted,
but verdict
set aside gene-
rally.

by him indorsed to the plaintiffs *Edie* and *Lard*, or order.

Ogilby became insolvent; and the question then was, Who was to *bear the loss*; whether *Mr. Campbell*, or the plaintiffs? (for the *East-India* company were no more than stake-holders.)

The dispute arose only upon this latter bill: for the first bill was given up at the trial, by the counsel for the defendants; and a verdict was taken for the plaintiff upon *that* count. But

On the second, an objection was taken to the *want* of the words "*or order*;" which the defendant's counsel insisted were necessary to be *originally* inserted by the indorser; and that the OMISSION of them was equivalent to the most *restrictive* words that he could have made use of in order to limit the payment. And accordingly, on this second count, a verdict was found for the defendants.

Mr. Morton, of counsel for the plaintiffs, having moved for a new trial, *Mr. Norton* and *Mr. Wedderburn* now shewed cause, on behalf of the defendants, why a new trial should not be granted.

In support of the motion, *Mr. Morton* and *Mr. Yates* had cited the three following cases, viz. * *More v. Manning*, *Comyns* 311. in point: where it was holden, "That a promissory note
"to pay one or order, is assignable *toties*
"quoties by the indorsee or indorsees, though
"the words *or order* be omitted in the indorsement."

† *Acheson v. Fountain*, 1 *Strange* 557. in point also; it being there holden, "That an
"indorsable note indorsed to *A. B.* without
"saying *or order*, is an indorsement to the indorsee or order: for the *law* interprets the
"assign-

* In C. B. Hil.
6 G. I.

† In B. R.
Trin. 1723.
Vide Eff. I.
[A.] II. (11.)
[4.] (a.)

" assignments to be in the *same* manner as the
" note is drawn."

And *Evans v. Cramlington*, in *Carthew* 5.
and 2 *Ventris* 309, 310. which was said to be
applicable to the present case.

They alledged, that every indorsement im-
ports that the *value has been received* by the
indorser: and

A promissory note or bill of exchange, ori-
ginally made payable to one or order, is *in*
its own nature assignable; and the assignee has
the *whole interest* in it, and may assign it as he
pleases; and any *restriction or confinement* of his
assignment of it is *contrary to the nature of the*
thing, and therefore void.

An indorsement is an assignment, and, for
the reasons aforesaid, is not restrainable by
the omission of words, or even by negative
words; and if it be given in blank, it may be
filled up by the indorsee or by any one else,
even in the face of the court, *at the trial* *.

* See *Comyna*
312. accord.

Having thus established this principle,
" That the bill of exchange being *originally*
" *made assignable and negotiable*, and being in
" *its own nature assignable*, must continue *al-*
" *ways so*; and that the law will interpret the
" assignment to be made in the *same* manner
" in which the bill is drawn, although the
" words *or order* be omitted."

They grounded their motion for a new trial
upon these two foundations:

1st, That the jury have found directly con-
trary to this settled law, and have founded
their verdict upon the CUSTOM OF MER-
CHANTS, which they suppose to be quite to
the contrary; and of which custom of mer-
chants *evidence* was permitted to be given at
the trial: which *evidence* should not have been

allowed. For the custom of merchants is part of the law of *England*; and the law of *England* being already fully settled on this point, no evidence in contradiction to it ought to have been *admitted*; nor can any finding of a jury *alter* it.

2dly, That if the counsel for the plaintiff had *apprehended* that such sort of evidence would have been gone into at the trial, they could and would have produced better and fuller evidence than they did, to prove that the custom of merchants was really and in truth and fact *agreeable* to the law as settled; and they alledged that *no fact* of usage was proved at the trial, to support a notion, that the acceptor was not liable upon such an indorsement as this.

Mr. Norton and Mr. Wedderburn, *contra* for the defendants, insisted that the present verdict was right, and ought to stand. It has been urged, 1st, "That this bill is in *its nature negotiable*;" and 2dly, "That being so, it cannot be *restrained* by this or *any other indorsement*."

As to the first:—They agreed a bill of exchange to be negotiable in its *nature*; but it does not follow, they said, that because it was *once* so, it must therefore *always continue so*: for the payee has the *absolute* property in it; he is the purchaser of it: and why should not he *limit* the payment of it as he pleases? No man can be *injured* by this; no man can be *deceived* by it; it cannot be attended with the least inconvenience.

No case can be cited to the contrary. The cases that have been cited do not apply to it; as will appear presently.

An *imperfect* indorsement, an indorsement in blank, indeed may be supplied: but the owner may, if he thinks proper, indorse it *negatively* and *upon terms*; and then the indorsee takes it upon those terms, and *under* that restriction, which the indorser has expressly imposed upon it.

This is no more than a naked authority to receive the money.

It is not true, "That every indorsement *imports* value received by the indorser. For an indorsement may be so worded as to shew that the interest *remains* in the indorser: as for instance, "Pay this bill to my *steward*, and to *no other person*;" or, "Pay to such a one *for my use*, and to no other person whatsoever."

And whether he has or has not so limited it, is a question of *fact*, not of law: and it depends upon the *custom of merchants*.

The case of *More v. Manning* does not contradict our principle: it does not appear that that was not an indorsement in blank; which, it is agreed, does not destroy its negotiability. The assignment was there treated as an absolute assignment to *Witherhead*: it must have been an indorsement in blank; and the case goes upon that supposition: however, that came before the court upon demurrer.

The case of *Acheson v. Fountain* was only a question, "Whether the plaintiff's evidence *supported her declaration*:" but her demand was full and clear, *without* those words. The case could not require the reasons there given: therefore they are at best extrajudicial, or perhaps added by the * reporter.

* The court expressed themselves to the effect there reported. Sir James Burrow's note of that case agrees with Sir John Strange's.

As to *Evans v. Cramlington*—'Tis nothing like this case; nor is any inference to be drawn from it.

Besides, all these cases are only upon *promissory notes*, which depend upon our municipal laws: and promissory notes are, by the stat. of 3 and 4 *Ann. c. 9.* put upon the same foot with *inland bills of exchange*.

† Wood's Inst.
283.

But *foreign bills of exchange* stand upon quite another foot; † namely, upon the general law and custom of merchants. And the verdict supposes and proves the custom of merchants to be with the defendants: and the evidence of several eminent merchants and experienced persons at the trial, was agreeable to the finding. And if they *could* have encountered it, why did they not? Their omitting to do so, is surely no ground for a new trial.

Mr. *Morton* and Mr. *Nates* in reply.—They admit the question to be, "What is the true construction of such a restrained indorsement as this is?" And certainly this sort of indorsement makes, or rather continues, a bill of exchange generally negotiable. Messieurs *Edie* and *Land* are in the case of every common indorsee.

The cases that we have cited are plain and clear on our side: on the other side, they suppose imaginary circumstances, which did not really exist in them.

The determinations upon promissory notes, prove "that the law was likewise so upon foreign bills of exchange."

The *fact* of usage, that would have been cogent and binding if proved, should have been a *refusal* to negotiate a bill with such a limited and restrained indorsement.

If

If this bill was to go back to *India*, protested by Messieurs *Edie* and *Lord* for non-payment by the company and the indorsers, undoubtedly the drawer would be liable to Mr. *Edie* and Mr. *Lord*, for the payment of it.

LORD MANSFIELD.—I thought, at the trial, that the defendants *might* be at liberty to go into the *usage of merchants* upon this occasion. And Mr. *Race*, the cashier of the Bank of *England*, gave evidence, "That the Bank, if ever they discounted these bills not indorsed to order, did it *only* upon the *credit of the indorser*; but that otherwise they would not take them, *not* considering them as being negotiable."

Mr. *Simon*, a very eminent and experienced merchant, deposed, That he considered the omission of these words as *restrictive* of the indorsement to the particular individual person specified in the indorsement: and he added, that it was, in his opinion, merely in the nature of a *personal authority*, "to receive the money," and was not negotiable.

So Mr. *Grant*, another witness on the part of the defendants, declared his opinion also to be.

So also Mr. *Regnier*, their fourth and last witness. These were the four witnesses for the defendants.

The plaintiffs, on their part, called Mr. *Richard Cope*, partner with Mr. *Honeywood* the banker: but they were mistaken in him; for he agreed with the other four witnesses exactly.

Another witness called by the plaintiff Mr. *Udney*: who thought it sufficient without the words "or order," and attested that he

had himself *discounted* one, and said he had paid, he believed, fifty bills, where the words "or order," were omitted in the indorsement.

Mr. Macbean, a notary public, also in his opinion held the indorsement of a bill of exchange to be negotiable, notwithstanding the omission of these words: and that no objection of this sort was ever made. Indeed if the bill should be indorsed, "Pay the contents to A. B. only," it was looked upon, he said, to be a restriction of the payment to A. B. personally.

Mr. Ury and Mr. Anderson deposed to the same effect, "that the omission of the words "or order, did not prevent the negotiability."

But the plaintiffs did not, however, come prepared with *particular* witnesses to the *usage* in such cases; not expecting that the evidence in support of such an *usage*, would have been admitted.

I told the jury, that by the *general* law, (laying the *usage* out of the case,) the indorsement would follow the nature of the original bill, and be an *absolute* assignment to the indorsee or his order.

And after having told them that this was the *general* law, then I left it to them upon the *particular* evidence of the *usage*, that had been laid before them; and recommended it to them to consider well of this evidence; and told them, that if they found an *usage*, so *established and settled* amongst merchants and traders as to be *clear and plain*, and *beyond doubt*, they might find a verdict for the defendant upon that second bill: but I directed them, that if they were *doubtful of the usage*, or if the *usage* appeared to them *not to be fully*
and

and clearly established, or to be the other way, then they ought to find for the plaintiffs.

I told them, that the question arose upon the insolvency of *Ogilby*, the first indorsee; and that it ought to be considered by them, who it was that gave the trust to *Ogilby*: for he that gives the trust, ought to run the risque of his credit.

I observed, that this indorsement was made by Mr. *Campbell*, the payee, to this *Ogilby*; and if he meant to trust *Ogilby*, it was but reasonable that he should be the person to suffer by *Ogilby*. And it was clear that he meant to trust *Ogilby* with the money: for it is acknowledged on all hands, that *Ogilby* himself had a right to receive it of the company, whether he had a right to indorse the bill to another person or not.

The jury staid out a considerable time, and then brought in a verdict for the plaintiffs, upon the bill indorsed to *Ogilby* or order, (which was not disputed :) but they gave their verdict for the defendants, upon that count which declared upon the second bill (for 2000*l.*) which was indorsed to him WITHOUT adding the words "or order."

In the whole course of the evidence, no one fact was proved, where the indorsee to whom a bill was indorsed, without adding the words, "or order," ever actually lost the money, so as to put him upon disputing the point.

Since the trial I have looked into the cases, and have considered the thing with a great deal of care and attention, and thought much about it: and I am very clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case.

case. Of this, I say, I am now satisfied; for the law is already settled.

I lay the case of *Evans v. Cramlington* out of the way, as I do not see that it is much applicable to the case now before us.

But I go upon the two cases of *More v. Manning*, and *Acheson v. Fountain*. The former was an *assumpsit* upon a promissory note, given by *Manning* to *Statbam* or order. *Statbam* assigned it to *Witherhead*; and *Witherhead* to the plaintiff. Upon a demurrer to the declaration, exception was taken, "because the assignment was made to *Witherhead* without saying to him *and order*; and then he cannot assign it over." But it was resolved by the whole court, that it was good: for if the original bill was assignable, then, to whomsoever it is assigned, he has all the interest in the bill, and may assign it as he pleases. And very right that was: for the main foundation is, "what the bill is in its original?" And accordingly, as that note was originally made payable to *Statbam and order*, they held the assignment of it to *Witherhead* to be an absolute assignment to him, which comprehended his assigns. It could not be an indorsement in blank; because it is stated, "that the assignment was made to *Witherhead*, without saying to him or order." The point resolved was, that the assignment to *Witherhead* was absolute. The words added at the end of the report are inaccurate, and might, at first view, occasion a little confusion: but, to be sure, the court went into an additional argument, which the reporter has omitted to particularise. But the declaration sets out the assignment; which is "an assignment by *Statbam* to *Witherhead*, omitting to add the words *and order*."

Then as to the other case of *Acheson v. Fountain*.

—The plaintiff had declared upon an indorsement made by *William Abercrombie*, whereby he appointed the payment to be “to *Louisa Acheson or order* :” upon producing the bill in evidence, which appeared to be originally made payable to *Abercrombie or order*, yet *Abercrombie’s* indorsement was only this—“Pray pay the contents to *Louisa Acheson*.” It was objected, “that the indorsement did *not agree with the declaration*.” The court, notwithstanding this, gave judgment upon the ground of a *general proposition* in law, “That a bill is negotiable, *without* adding those words to the indorsement.” And though the plaintiff *might*, perhaps, have had leave to amend his declaration in the point objected to, yet the declaration came before the court *unamended* : so that the objection came with it’s full strength ; and the court gave their opinion upon the point, as a matter of *clear settled law* : for the whole court were of opinion, “that it was well enough, *that being* “the *legal import* of the indorsement ; and “that the plaintiff *might, upon this, have indorsed it over to another*, who would be the “*proper order* of the *first indorser*. And accordingly, judgment was given for the “plaintiff.”

A draft drawn upon one person, directing him “to pay money to another, or “order,” is, in it’s *original creation*, *not an authority*, but a *bill of exchange*, and is negotiable. It belongs to the payee to do what he thinks proper with it, and to use it as best suits his convenience. It is his *property* ; and he may assign it *as such*, and to whom he pleases : and his direction “to pay it *to such a*
“one,”

"one," is a direction "to pay it to him or his order;" for he assigns his *whole* property in it, and has had a *valuable consideration* for so doing.

Another thing observable is the absurdity of the opinion of the merchants, (which they avowed to be their opinion,) "that a bill thus indorsed was *not* to go to the executors or administrators, in case of the indorsee's death:" whereas there can be no doubt, that such an interest is *transmissible* to executors or administrators.

The words "*or order*" are not necessary to be inserted in the indorsement, any more than the words "*executors or administrators*," are necessary to be added to it.

The point now in question has been already *solemnly settled* both in the court of king's-bench and common-pleas, by the two adjudications that have been mentioned: and therefore witnesses ought *not* to have been examined to the *usage*, after such solemn determinations of what was the law.

Therefore there ought to be a new trial.

As to the costs—I think there should be none, in this case. For the verdict must be set aside *generally*, not in part only. Yet this verdict is agreed to be right upon the *first* count; and that is found for the *plaintiffs*; therefore there ought to be no costs upon granting a new trial in the present case: since the merits were *always* clear for the plaintiffs, on the *first* count; and it *now* appears that nothing remained to be tried, on the *second*.

Mr. Just. Denison concurred *in toto*.

This verdict upon the second count is not well founded. The point in question is not matter of *fact*; but matter of *law*.

I never

I never before heard of this notion of a *restrictive* assignment of a *negotiable* bill.

Where a bill is originally made payable to *A.* or order, it is of course and in its very essence negotiable from hand to hand. An inland bill of exchange is assignable in its nature *toties quoties*: and promissory notes are now put upon the same foot with them. Foreign bills of exchange are equally so, by the law of merchants, and by the settled determinations of courts of law in *England*.

This is a matter of *law*: and the law is clearly and fully fixed. There is no instance of a *restrictive limitation*, where a bill is *originally* made payable to a man or order.

I never heard of an indorsement to *A. only*. In general, the indorsement follows the nature of the thing indorsed; and is equally negotiable.

But at least, *here* is no such restraint as *that*: here is nothing from whence to collect an *intent* to limit and restrain it. The law has determined that the bill is negotiable in itself; and there is no law to the contrary, nor any pretence for it in the present case. And it would be infinitely inconvenient, if it should be otherwise; for as no circumstances at all appear, it would destroy or disturb that *certainty* which transactions of this nature require.

An *executor* or *administrator* may indorse a bill or promissory note, within the custom of merchants. In the case of *Rawlinson v. Stone*, *M. 20. G. II. B. R.* upon a writ of error from *C. B.* an inland * bill of exchange was made payable to *A.* or order: *A.* died, and the administrator of *A.* assigned the note to the plaintiff in the common-pleas, for whom that court gave judgment upon demurrer. The court upon argument of the writ of error here,

* 2 Stra. 1269;
Robinson v.
Stone,

here, held, "that the *executor or administrator* " might assign it over:" and they affirmed the judgment of the court of common-pleas. The executor or administrator is only assignee in *law*, not in fact: yet they held that he might assign it by the *name* of executor or administrator; and that it was the common method to do so, the indorsement virtually included it.

Now the present case includes that, and more: for here, the first indorsee was an assignee in *fact*. And it ought to be so, for the sake of certainty, and for the benefit and convenience of trade. No intention appears here to restrain it: and in general, the *law* says it is assignable.

And it is not material when or how filled up: for it is every day's practice to fill up the indorsement long after it is made; nay even in court, at the trial.

I will not give any opinion whether the indorser MIGHT have limited his assignment by some clear plain negative words, if in fact it had been his intention to limit and restrain it.

But no such intention appears: the indorsement is *general*; and the law is settled, "that " the assignment follows the nature of the " thing assigned."

And the law being already so settled, the jury ought not to have given their verdict upon an opinion contrary to it.

A new trial ought therefore to be granted: but no costs should be paid: for the reasons already mentioned.

Mr. Justice *Foster* concurred that there should be a new trial; because it is a verdict against a known and settled rule of law; as appears by the two adjudged cases reported in

Comyns

Comyns and Strange. Therefore it ought not to have been left to a jury at all.

Much has been said about the *custom of merchants*; but the *custom of merchants*, or law of merchants, is the law of the kingdom, and is *part of the common law*.

People do not sufficiently distinguish between customs of different sorts, the true distinction is between *general* customs (which are *part* of the common law) and *local* customs, (which are not so.) This custom of merchants is the *general law* of the kingdom, part of the common law; and therefore *ought not* to have been left to the jury, *after* it has been already settled by judicial determinations.

But there should be *no costs* paid upon this occasion; because the verdict is both against law and against the opinion and direction of my lord chief justice, upon the second count; and is with the plaintiffs, on the first.

Mr. Just. *Wilmot* was of the same opinion.

The *law* with regard to this point, is *settled* and fully *established* by the two cases which have been cited; and upon right and proper principles.

This original contract is, "to pay to such person or persons, as the payee or his assignees "or their assignees shall direct:" and there is as much privity between the last indorser and the last assignee, as between the drawer and the first payee. When the payee assigns it over, he does it by the law of merchants; being a chose in action, not assignable by the general law. And the indorsement is *part* of the original contract, and is *incidental* and *appurtenant* to it in the nature of it; and must be understood and interpreted to be made in the *same manner* as the bill was drawn. And the indorsee holds it in the

the same manner, and with the same privileges, qualities, and advantages, as the original payee held it; that is, as an assignable negotiable note, which he may indorse over to another, and that other to a third, and so on at pleasure.

There is a great deal of difference between giving a naked authority "to receive it," and transferring it over by *indorsement*. And I doubt whether he *can* limit his indorsement of it by way of assignment or transfer to another, so as to *preclude* his assignee from assigning it over as a thing negotiable. For the assignee purchases it for a *valuable consideration*; and therefore purchases it with all its privileges, qualities, and advantages; one of which is, it's negotiability.

To be sure, he *may give* a mere *naked authority* to a person "to receive it *for him*;" he may write upon it—"pray pay the money to my servant for my use;" or use such expressions as necessarily import that he does *not mean* to indorse it *over*; but is only authorising a particular person to receive it *for him* and for his *own use*. In such case, it would be clear that *no* valuable consideration had been paid him. But at least, that intention must *appear upon the face of the indorsement*. Whereas here, *no* such thing nor any thing tending to it, appears upon the face of the indorsement: it is a *general assignment* without any restriction at all.

The principle I rely upon, is the *paying a valuable consideration* for the assignment.

In the case of *More v. Manning*, (*which is in point*,) those words added at the end, * "that at a trial, when a bill is given in evidence, the party may fill up the blank as he pleases,"—are redundancy. And that indorsement

* Vide Comyns, 312.

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indorsement could not be an indorsement in blank: it appears otherwise from the case itself. It was made to *Witherhead*, but without saying to "him and order."

So the other case reported in 1 *Strange*, 557. is likewise in point. And there is no difference, whether the determinations be on promissory notes or on bills of exchange; it is just the same thing; because it is to be governed by the same rule.

[He cited a manuscript report of the case of *Acheson v. Fountain*, which is reported by Sir *John Strange*: which agreed with Sir *John's* report of it.]

There is another case in *Carthew*, 403. *Fisher v. Pomfrett*, that shews this to be a right determination; (though the state of that case was indeed just the reverse of the present case.) It was a bill of exchange, payable to *T. S.* who indorsed it, "pay the contents of this bill unto the order of Mr. *Fisher*." *Fisher* brought his action as indorsee. The defendant demurred to the declaration, because the indorsement was not to *Fisher* himself, but to his order; but the court held that *Fisher* might well bring the action: "for, amongst tradesmen, that form was commonly used, though intended to be made payable to the person whose order is mentioned." And *Fisher* had judgment.

Therefore a note indorsed over to *A.* would enable him to indorse it over to *B.* and so on. For the convenience and course of trade is to be attended to: the intention is to be regarded, not the form.

The custom of merchants is part of the law of England: and courts of law must take notice of it as such.

There may indeed be *some* questions depending upon customs amongst merchants, where, if there be a DOUBT *about the custom*, it may be fit and proper to take the opinion of merchants thereupon: yet that is only where the *law* remains *doubtful*. And even there, the custom must be proved by *facts*, not by OPINION only: and it also must be subject to the controll of law. And so was the case of *Hawkins v. Cardy*, reported in *Cartbret*, 466. and in 1 *Salk.* 65. There the defendant had given a note under his hand, "to pay unto *E. G.* or order a certain sum of money: "*E. G.* by indorsement on this note, ordered PART of *the money* to be paid to the plaintiff.

"Upon which this action was brought: "and a special *custom* amongst merchants was "laid in the declaration, according to the "plaintiff's case." Upon a demurrer to this declaration, it was adjudged, "that this is a "void custom; because by means of such "division, the defendant would be subject to "as many actions, as the person to whom the "note was given should think fit; and this "upon a *single contract*, which subjected him to "one action only." This warrants what I said, "That the *original contract* must be looked into." Here the original contract is a *negotiable bill*; and the indorsee is in the *place* of the original payee.

The two cases of *More v. Manning*, and *Acheson v. Fountain*, serve to prove "that there "is no *such custom of merchants* as the defendants pretend:" for they could not have been so determined as they were, if there *had* been such a custom of merchants.

Therefore these *judicial* determinations of the point are the LEX MERCATORIA, as to *this* question: for they settle what *is* the custom

of

of merchants; which custom is the *lex mercatoria*, which is part of the law of the land: but this finding of the jury in the present case, is directly *contrary* to the *lex mercatoria* so fully settled and established by legal adjudications.

Therefore the verdict ought to be set aside: but it should be without costs; for the reasons already specified.

Per. Cur. unanimously,

The verdict was set aside, and a new trial ordered; (but without costs.)

This was action of trespass *vi et armis*, for taking five boys, apprentices to the plaintiff, out of the hands of the plaintiff.

LORD MANSFIELD, who tried the cause, reported the evidence.

These were apprentices regularly bound to *Reavely*, for the sea service. The action was trespass *vi et armis*, for taking them.

It was proved, on the part of the plaintiff, that they were voluntarily indentured to him, and were by his direction delivered to one *Jones*, to be kept by him, to prevent their running away. Part of *Jones's house* was a prison, part a public house.

The justices, at their session of gaol delivery, upon a complaint of "an intention to sell" "them in *Guinea*," discharged them.

Reavely ordered them to be put into the hands of *Jones*. *Walker* sent a note to *Jones*, to deliver them to the lieutenant of a tender of a man of war: who thereupon delivered them, and took a receipt for them.

This was the evidence for the plaintiff.

On the part of the defendants, it appeared that one *Lane* told *Walker* of the boys complaints, and of the affecting scene that he had seen.

Reavely v. Mainwaring, &c.
Walker, et al.
H. 2. G. III.
B. R. 3. Burr.
1306.

Trespass for taking five boys, apprentices to the plaintiff, out of his hands. Apprentices discharged by justices at sessions, on complaint of an intention to sell them in *Guinea*. They had been put by plaintiff into the hands of *Jones*, to be kept safely: *Walker* sent a note to *Jones* to deliver them to the lieutenant of a tender of a man of war. They were accordingly delivered.

Walker, who was lieutenant of a man of war, had, upon the boys being discharged, obtained their consent to serve the king, and had given *Jones* a guinea to take care of them 'till

he sent for them,
&c.

Verdict for all
the defendants.

Motion for new
trial. Qu. if tref-

pafs *vi et armis*,
will lie in this

case. Walker
ought to have

been found
guilty, because

he sent a prefs-
gang for them.

But as it was an
hard action a-

gainst him, new
trial refused.

No colour for
the action against

the other defend-
ants.

One of the boys also gave evidence of *Black-wood's* picking them up; and of their being deceived, and ill used at *Jones's*, and their endeavours to escape. That *Walker* and *Pell* came to the prison: and the boys made their complaints to them. Upon which they were sent for to the court-house: and they all made their complaints to the justices, of their being deceived, imprisoned, ill used, &c. and their apprehensions of being sold.

The plaintiff next morning sent coaches to carry them away. They resisted. *Walker* (who was lieutenant of a man of war) being present, asked them if they were willing to serve the king. They assented. He sent a prefs-gang. They went with their own consent. They begged of the justices to be set at liberty. They were brought into court before the justices as prisoners; but no commitment being produced, the justices discharged all and each of them, by writing against their names—"discharged."

Walker bid *Jones* to keep them *that night*. But there was no order to deliver them to *Walker*: they were only discharged from being kept as prisoners. Whereupon *Walker* asked if they were willing to serve the king: to which they assented. And *Walker* gave *Jones* a guinea to take care of them that night.

At the trial, all the defendants were found "not guilty;" as well the justices, as the lieutenant.

Mr. Yates now shewed cause against a new trial, which had been prayed by the plaintiff.

He insisted, that as the boys were in the hands of *Jones*, who he said, was agent to the plaintiff, and delivered them to the lieutenant who commanded the prefs-gang, upon a note from *Walker*, and took a receipt for them from him,

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him, here was *no force*; therefore trespass *vi et armis* will not lie. It ought to have been an action upon the case, or an action upon the statute of labourers: for which, he cited *Bro. Abr.* title *Labourer* 21, 28. as in point. 6 *Mod.* 182. *Queen v. Daniel*, (the second resolution) is in point also, "that a common action of trespass will *not lie*, for enticing an apprentice or servant from his master, if there be *no force*."

And here, *Jones's* delivery was the delivery of the *plaintiff*; he was the *owner's agent*.

Mr. Solicitor-General, and Mr. *Morton*, on behalf of the plaintiff, did not dispute the law, but the *fact*.

The justices discharged the boys: they were put into the hands of *Jones*, by the justices. *Walker* ordered them out of *Jones's* hands into the hands of the lieutenant, who headed the press-gang.

Here was *no seduction* or *intisement*; but a forcible taking away a man's apprentices by a press-gang, and carrying them on board a man of war: in which *Walker* was concerned, as having actually sent the press-gang to fetch them. And in trespass, *all are principals*.

LORD MANSFIELD.—It was objected, at the trial, that *Walker* could not be liable to an action of trespass *vi et armis*: for that *Jones* delivered them *voluntarily* to the lieutenant.

But I thought then, and now think that he was liable to this action; because he sent a *force*, a press-gang, to take them.

As to the justices,—there was no colour to maintain the action against them.

A special jury of gentlemen found all the defendants not guilty.

I think they *ought* to have found *Walker* guilty, upon the evidence that was laid before them. Yet it would have been very hard, if *Walker* had suffered for his behaviour upon this occasion ; because he seems to have acted with good intentions.

Therefore I think that there ought *not* to be a new trial.

Rule to shew cause " why there should not " be a new trial."—Discharged.

Earl of March
v. Pigot. Trin.
Tm. 11 G. III.
in B. R. 5 Burr.
2802.

A Newmarket
wager, upon the
lives of the elder
Mr. Pigot, and
Sir Will. Cod-
rington. Mr.
Pigot's father
died at two in the
morning of the
day the bet was
made, in Shrop-
shire.

Objection the
contract void, as
being without
consideration.
That it respected
a future contin-
gency, and that
it was impossible
Mr. Pigot should
win.

Adj. that the na-
ture of the con-
tract, and the
manifest inten-
tion of the par-
ties, supported
the verdict.
New trial re-
fused.

A verdict having been found for the *plaintiff*, Mr. *Lee* moved on behalf of the defendant, for a new trial.

The cause was tried before Lord MANSFIELD. It was a contract made at *Newmarket*. The wager was originally proposed between young Mr. *Pigot*, the present defendant, and young Mr. *Codrington*, to run their fathers (to use the phrase of that place,) each against the other. Sir *William Codrington*, the father of Mr. *Codrington*, was then a little turned of fifty: Mr. *Pigot*'s father was upwards of seventy. Lord *Ossory* computed the chances, according to the above-mentioned ages of their respective fathers. Mr. *Codrington* thought the computation was made too much in his disfavour. Whereupon Lord *March* agreed to stand in Mr. *Codrington*'s place: and reciprocal notes were accordingly given between the earl and Mr. *Pigot*.

Mr. *Pigot*'s note ran thus,—“ I promise to
“ pay to the Earl of *March*, 500 guineas, if
“ my father dies before Sir *William Codrington*.
“ *William Pigot*.”

The earl's was—“ I promise to pay to Mr.
“ *Pigot* 1600 guineas, in case Sir *William*
“ *Codrington* does not survive Mr. *Pigot*'s
“ father. *March*.”

No

No mention was at all made, at the time of this transaction, about their father's being *then* dead or alive. But the fact was, that Mr. Pigot's father was then actually *dead*: He died in *Shropshire*, 150 miles from *London*, at two o'clock in the morning of the *same* day on which this bet was made at *Newmarket*, after dinner.

However, this fact was not, at that time, at all known to any of the parties; nor was there any reason for suspecting that Mr. Pigot's father was then dead. There was no objection made at the trial, against going into *parol* evidence. Lord *Mansfield* left the matter to the jury, who found a verdict for the plaintiff, with 525 l. damages.

The objection was, that the *contract* was void; it was without any *consideration*: for there was no possibility of the defendant's *winning*, (his father being then actually dead;) and therefore he ought not to *lose*. It was a contract in *futuro*, manifestly made upon the supposition of a *then future* contingency. The meaning can't be doubted: and the words sufficiently express that meaning. "If my father dies before Sir *William Codrington*," is equivalent to saying, "If my father *shall* die before Sir *William Codrington*." But his father was dead before he entered into this contract.

Mr. *Lee* said, it was given in evidence, and is certainly true, that their fathers being dead, or being alive, made no difference in the proportion of the value of the chance: and he observed, that in the case of an insurance upon a ship, if the words "lost or not lost," be not inserted; and the fact should happen to be, that the ship was actually lost at the time

when the insurance was made; the insurance is void.

Rule to shew cause why there should not be a new trial.

And now Mr. *Wallace*, Mr. *Dunning*, and Mr. *Mansfield*, on behalf of the plaintiff, shewed cause against a new trial being granted.

They said that the insertion of the words "lost or not lost," was peculiar to *English* policies: it is not inserted in the policies of other nations. *Roccus* fo. 205. No. 175. And the reason there given (at the end of it,) namely, "that the fact being *unknown* will "not prejudice the insurance," applies to the present case.

Supposing it to have related to the death of persons in *India*, or the safety of the *Aurora*, can any one imagine that the insurance would be void, because the event had happened antecedent to the making of the contract?

The event of either of the two fathers being then already dead, did not occur to the parties. If it had, it would not have varied the bet. The two reciprocal notes undoubtedly mean one and the same event. Retrospect is included, as well as futurity.

Mr. *Lee* and Mr. *Bolton*, for the defendant, replied, that by the law of *England* it is necessary to insert the words "lost or not lost," in ship-policies: otherwise the insurance is void, if the ship was then already lost. And this, they said, was expressly laid down by *Molloy*.

The bet went upon the idea that both fathers were then living: and so the evidence agreed. The bet was clearly future. If a bet be laid upon two horses, and one is dead at the time, it is no bet.

The

The case of the *Mills* frigate was an insurance upon a ship, which had a latent defect totally unknown to the parties: and the insurers were holden not liable, *upon account* of the ship's being not *sea-worthy*, though such defect was *not known*.

LORD MANSFIELD.—I differ totally in opinion from that doctrine. The determination in that case, (which was made by my Lord Chief Justice *Wilmot* and me, to whom it was referred,) was made quite upon another ground: (and the change of opinion in the court of common-pleas happened upon the citing of two cases that had been determined before me; which cases were mistaken. The insured ought to know whether his ship was sea-worthy or not, at the time when she *set out* upon her voyage: but how should he know the condition she might be in, after she had been out a twelve-month?

If the present case had stood upon written evidence only, it had been matter of law. But there was no objection made, at the trial, against going into parol evidence.

The question is, "What the parties really meant?" The material contingency was—"Which of these two young heirs should come to his father's estate first?" It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted, nor excepted. It was equal to both of them, whether one of their fathers should be then sick or dead. All the circumstances shew, that if it had been then thought of, it would not have made any difference in the bet; and there was no reason to presume that they would have excepted it.

The

The intention was, that he who came first to his estate, should pay this sum of money to the other, who stood in need of it. That the event *had* happened, was in the contemplation of neither party.

Both notes are so penned, as to be applied to what was *to happen*. But the nature of such a contract, and the manifest intention of the parties, support the verdict of the jury, (to whom it was left without objection,) "that he who succeeded to his estate first, by the death of his father, should pay to the other," without any distinction whether the event had or had not, at that time, actually happened.

Mr. *Justice* ASTON.—It was originally intended to be a bett between two young heirs apparent; and the material point to be settled was, to fix the difference of the chances of the survivorship of their fathers. The mere survivorship was the thing intended to be betted upon. The jury were the proper judges of the intention of the bett; and they have determined *what* that intention was. *If* it had stood singly upon the defendant's *note*, I should have thought it *not* to be a good promise at the time of giving it. But taking the evidence and all the circumstances *together*, it was proper to be left to the jury: and the jury, taking the circumstances into consideration, (and it was proper to take them into consideration,) have determined it. I see no ground for granting a new trial.

The other two Judges concurred; and the court unanimously discharged the rule for a new trial.

Action

Action for money had and received, and for money paid, laid out, and expended.

On the trial of this cause before Lord Mansfield, at the sittings at Westminster after last Michaelmas term, it appeared that this suit was instituted by the plaintiff, to recover ten guineas, which he had paid to the defendant for a one-horse chaise and harness, on condition to be returned, in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it.

This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it: the hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money.

After a verdict had been given for the plaintiff, Sir Thomas Davenport obtained a rule to shew cause, why a nonsuit should not be entered, on the ground that this *action for money had and received* would not lie; but that it should have been on the *special contract*.

Erskine now shewed cause.

This case is very distinguishable from those of *Power v. Wells* (a), and *Weston v. Downes* (b), on which this rule was obtained. In the former of those cases, it was determined, that a *warranty could not be tried in an action for money had and received*: and in the latter, that such an action did not lie, the payment having been made on a *contract which was still open and disputed* by the defendant. But this is the very case put by Mr. Justice Ashburst (c),

Towers v. Barrett, H. 26 G. 3.
B. R. Durnford and East 1 V.

133.
Assumpsit for money had and received lies when a payment has been made on a contract which is put an end to, as where either by the terms of the contract it is left in the plaintiff's power to rescind it by any act, and he does it; or where the defendant afterwards assents to its being rescinded. But if it continue open, the plaintiff can only recover damages, and then he must state the special contract, and the breach of it.

(a) Cowp. 818.
Vide post.

(b) Dougl. 23.
Vide post.

(c) Dougl. 24.

The

The principle is this, where a man enters into a contract for a sale, and he warrants that the object of that sale shall be of a certain denomination, and he does no act to disallow that contract, there money had and received will lie against him: but where the warranty is disputed, that must be tried in an action on the special contract. In the present case, there was no warranty: it was only a sale on condition, which failed. And it was held in *Moses and Macferlan* (a), that an action for money had and received will lie to recover money paid by mistake, or upon a consideration which happens to fail.

Sir *Thomas Davenport* in support of the rule.

Wherever there is a special contract, whether conditional or absolute, or in whatever terms it may be conceived, so long as that contract remains open to be disputed, and the party has done nothing to acknowledge the contract, or to preclude himself from entering into the nature of it, the defendant ought to have notice on the declaration, that he is sued on that contract.

The cases of *Power v. Wells*, and *Weston v. Downes*, are decisive as to the present. This comes within the principle laid down by Mr. *J. Buller*, in the latter of those cases, where he said, "where the contract is open, it must be stated specially."

The chaise was left on the premises, but the defendant refused to receive it: then the question is, whether the plaintiff had a right to return it? And how that right is to be tried?—There are several matters here in controversy, which cannot be tried in an action for money had and received: 1st, Whether in fact there was any contract; 2dly, The extent

(a) 2 Burr.
8012.

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tent of it; and, 3dly, What the plaintiff ought to have paid *per diem* for the hire: for it is open on this declaration to say, that the defendant ought to have had 5 s. *per diem*, as well as 3 s. 6 d.

When the party has done any thing to preclude himself from going into the contract, then money had and received will lie: but here the defendant disputes it.

LORD MANSFIELD, *Ch. J.*—I am a great friend to the action for money had and received: it is a very beneficial action, and founded on principles of eternal justice.

In support of that action, I said in the case of *Weston v. Downes*, that I would guard against all inconveniencies, which might arise from it, particularly a surprise on the defendant; as where the demand arises on a special contract, it should be put on the record. But I have gone farther than that: for if the parties come to trial on another ground, though there happens to be a general count for money had and received, I never suffer the defendant to be surprised by it, unless he has had notice from the plaintiff that he means to rely on that, as well as the other ground.

But consistent with that guard, I do not think the action can be too much encouraged. Here there is no pretence of a surprise on the defendant: there is no other question to be tried. The defendant knew the whole of the matter in dispute as well as the plaintiff. On what ground can it be said that this is not money paid to the plaintiff's use? The defendant has got his chaise again, and, notwithstanding that, he keeps the money.

The case was well put by Mr. J. *Asburst*, in *Weston v. Downes*, and I think this is exactly

actly like that. I was of opinion at the trial that this action would lie; and I still continue of that opinion.

WILLES, J.—The only difficulty is to distinguish this case from that of *Weston* and *Downes*; and I think it differs from that on two grounds.

That was an absolute, this a conditional, agreement. And another more material difference is, that this agreement was at an end: the contract was no longer open.

In the case of *Weston* and *Downes*, Mr. J. Buller said, "This action will not lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses:" but in the present case, the defendant has precluded himself by taking back the chaise. I think the verdict is right.

ASHHURST, J.—This action is maintainable; for it is different from the cases of *Weston v. Downes*, and *Power v. Wells*. The latter was merely a case of warranty. In these actions, the party cannot desert the warranty, and resort to the general count, because the warranty itself is one of the facts to be tried.

As to that of *Weston v. Downes*—on the first contract there was an agreement to take back the horses, provided they were returned within a month: that would have been like the present case, if they had been returned within that time; but there was an end of the first contract, for the plaintiff took a second, and then a third pair of horses: that was a new contract, not made on the terms of the first, and that is distinguishable from the present case.

But

But laying that determination out of the question, this is like the common cases, where either party puts an end to a conditional agreement. Here the condition was to return the chaise, if not approved of; therefore, the moment it was returned, the contract was at an end, and the defendant held the money against conscience, and without consideration.

BULLER, J.—On the very principle in *Weston v. Downes*, and *Power v. Wells*, which determined, that the action for money had and received would not lie in those cases, it is clear that this action will lie.

It is admitted, that if the defendant had accepted the chaise, the action would lie: but it has been contended, that he did not receive it. Then let us see whether there is not something equivalent to an acceptance? I think there is, from the terms of the contract.

There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise, when it was offered to him; he was bound to receive it; and therefore it is the same as if he had accepted it.

The distinction between those cases, where the contract is open, and where it is not so, is this: if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is intitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's

demand is not for the whole sum, but for damages arising out of that contract.

In a late case before me, on a warranty of a pair of horses to Dr. *Compton*, that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held, that if the plaintiff would rescind the contract intirely, he must do it within a reasonable time, and that as he had not rescinded the contract, he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old.

So that the difference, in cases of this kind, is this: where the plaintiff is intitled to recover his whole money, he must shew that the contract is at an end; but if it continues open, he can only recover damages, and then he must state the special contract, and the breach of it.

Rule discharged.

For the purpose of farther elucidating the preceding subject, the three following cases are given, two of which are several times cited in the preceding case.

Stuart v. Wilkins, M.
19 G. III. B. R.
Doug. 18.
Assumpfit is a proper form of action, where there has been an express warranty.

The two first counts in the declaration in this case were as follows:—*David Stuart* complains of *James Wilkins* being, &c. For that whereas the said *James*, on the 1st day of *February*, in the year of our Lord 1778, at *Hatfield*, in the county of *Hertford*, offered to sell to the said *David*, a certain mare of him the said *James*, and whereupon afterwards, to wit, on the day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, in consideration that the said *David*, at the special instance and request of the said *James*, would buy of him the said *James*, the said mare, at and for a certain

certain large price or sum, to wit, the price or sum of 31l. 10s. of lawful money of *Great-Britain*, to be paid by the said *David* to the said *James*, when he the said *David* should be thereunto afterwards requested; he the said *James* undertook, and then and there faithfully promised the said *David*, that the said mare was sound; and the said *David* in fact saith, that he, confiding in the said promise and undertaking of the said *James*, so by him made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, at the special instance and request of the said *James*, did buy of the said *James* the said mare, at and for the said price or sum of 31l. 10s. and did then and there pay to the said *James* the sum of 25l. 5s. part of the said sum of 31l. 10s. and did then and there undertake, and faithfully promise the said *James*, to pay him the further sum of 6l. 5s. residue of the said sum of 31l. 10s. when he the said *David* should be thereunto afterward requested: yet the said *James*, not regarding his said promise and undertaking so by him made as aforesaid, but contriving and fraudulently intending to injure the said *David* in this behalf, did not regard his said promise and undertaking so by him made as aforesaid, but craftily and subtilly deceived the said *David* in this, that the said mare, at the time of the making the said promise and undertaking of the said *James*, was not sound, but on the contrary thereof was unsound, and was afflicted with a certain malady or disease, called the wind-galls, to wit, at *Hatfield* aforesaid, in the county aforesaid; whereby the said mare then and there became, and is of no use or value to the

said *David*.—And whereas also the said *James*, afterwards, to wit, the same day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, in consideration that the said *David*, at the like instance and request of the said *James*, had bought of him the said *James*, a certain other mare of him the said *James*, at and for a certain other large price or sum, to wit, the sum of 31 l. 10 s. of like lawful money, and had then and there paid to the said *James* the sum of 25 l. 5 s. in part of the said last mentioned sum of 31 l. 10 s. and had then and there undertaken and promised to pay to the said *James* the further sum of 6 l. 5 s. residue of the said last mentioned sum of 31 l. 10 s. when he the said *David* should be thereunto afterwards requested, *he the said James undertook, and then and there faithfully promised him the said David, that the said last mentioned mare was sound.*—Yet the said *James*, not regarding his said last mentioned promise and undertaking so by him made as aforesaid, but contriving and fraudulently intending to injure the said *David* in this behalf, did not regard his said promise and undertaking so by him made as last aforesaid, but craftily and subtilly deceived the said *David* in this, that the said last mentioned mare, at the time of the making of the said last mentioned promise and undertaking of the said *James*, was not sound, but then was unsound, whereby the said last mentioned mare became and is of no use or value to the said *David*.—To these were added a count for money laid out and expended, and another for money had and received.—The cause was tried at the assizes at *Hertford*, before Lord MANSFIELD, and a verdict found for the plaintiff; but the evidence

evidence given being of an *express* warranty, and a doubt being raised whether, in such a case, this was a proper form of action, the verdict was taken, subject to the opinion of the court on that question.

Upon the motion for setting aside the verdict, and entering a nonsuit, Lord MANSFIELD said, that it had been suggested, that the form of this declaration arose from a determination of his at the same place, about twenty years ago, but that that was a case of a clear fraud, and that it was declared on as a fraud.

Cause was now shewn against making the rule absolute.

Kempe Serjeant, and *Morgan*, for the defendant, contended that there are two sorts of warranty, 1. *express*, 2. *implied*.—That, in an *express* warranty, the party is liable without alledging notice; but that it must be laid *warrantizando vendidit*.—That every promise is executory, and refers to something to be done in future; whereas the declaration here charged the defendant with promising a thing past. They cited *Finch*, 180. *Dyer*, 75. *pl.* 23. *Bro. Abr. tit. Action sur le case pl. 8.* *Keilnay*, 91. 2 *Lord Raymond*, 1118. *Herne's Pleader*, 7, 77, 223. *Rastall*, 9. 1 *Ventr.* 365. *Alleyne*, 91. *Salk.* 210. *Fitz. N. B.* 98. *a.*

Lord MANSFIELD.—The declaration struck me as particular, in departing from the old rule of declaring *expressly* on the warranty. A warranty extends to all faults, known and unknown to the seller. Selling for a sound price without warranty, may be a ground for an *assumpsit*; but, in such a case, it ought to be laid that the defendant knew of the unsoundness. I left it to the jury as on a war-

ranty, subject to the opinion of the court, whether a nonsuit should not be entered. I am told by the learned judges, on my left hand (ASHHURST and BULLER, *Justices*,) that this sort of declaration, where a warranty is to be proved, has been practised for twenty years, and that it is made use of with a view to let in both proofs if necessary.

ASHHURST, *Justice*.—Whatever may have been the old form, I believe it has been long settled that this form of action is right; and, having been long established, I am of opinion that it ought to be supported. There may be cases where the count for money had and received, may be of use to the plaintiff, and the warranty including the promise, may be declared on as such.

BULLER, *Justice*.—This mode has been in use ever since I have known any thing of practice, and my brother ASHHURST remembers it much longer. There is no objection to it, in point of form, which could prevail even on a special demurrer. Promises are not all executory. Do not all our law books make a distinction between promises executed, and promises executory;—that in one, you may traverse the consideration, in the other not? Because another action would lie, it does not follow that this will not. It was determined in *Slade's case*, that there may be different actions for the same injury (a).

(a) T. 44 Eliz.
4 Co. 92. b.

Weston v.
Downes, M.
19 G. III. B. R.
Doug. 23.
Assumpsit for
money had and
received, will
not lie when the
payment has

This was an action for money had and received by the defendant, to the use of the plaintiff. On the trial, before Lord MANSFIELD, the plaintiff proved that the defendant, in consideration of seventy guineas, had sold him a pair of coach horses, which he undertook to take back, if the plaintiff should dis-

approve

approve of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant in their stead, without making any new agreement. These he also returned within a month, and received a third pair on the 23d of *December*, without any fresh bargain. This third pair he disapproved of, because they were restive, and would not draw, and offered to return them on the 5th of *January*; but the defendant refused to take them back.

LORD MANSFIELD directed a nonsuit; and, on a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, the question was, whether the action of *assumpsit* for money had and received, would lie in this case.

Dunning and *Davenport*, for the plaintiff, contended, that there was an end of the contract on the return of the first pair of horses, and that then a right accrued to bring this action.

The *Solicitor General*, for the defendant, insisted, that the contract was continued by taking other horses, and that the plaintiff ought to have declared upon the special agreement.

LORD MANSFIELD.—I am a great friend to the action for money had and received; and therefore I am not for stretching, lest I should endanger it. Where there is a special contract, the defendant ought to have notice, by the declaration, that he is sued upon that contract.

WILLES, *Justice*, of the same opinion.—Here was originally a special contract, and it continued between the parties through all their subsequent dealings.

been made on a contract which is still open, and not given up by the defendant,

ASHHURST, *Justice*.—If the plaintiff had demanded the seventy guineas, and brought his action on the return of the first pair of horses, and no second pair had been sent, this action would have lain; but here the contract was continued, and the case resembles one that was tried before me on the midland circuit, and afterwards came on in this court, *viz.* *Power v. Wells*, E. 18 Geo. III. (a).

(a) Vide post.

BULLER, *Justice*.—This action will not lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses. Where the contract is open, it must be stated specially. In *Power v. Wells*, the defendant had warranted a horse to be sound, which proved unsound. The plaintiff tendered a return of the horse, but the defendant refused to receive him, and an action for money had and received being brought, it was held by the court, that it would not lie.

The rule made absolute for a nonsuit to be entered.

Power v. Wells,
Idem v. Eundem,
E. 18 G. III. B.
R. Cowp. 818.
If money and a
horse are given
in exchange for
another horse
warranted sound,
which was un-
sound at the
time, an action
for money had
and received, is
not a proper ac-
tion to try the
warranty;—nor
will trover lie for
the horse given
in exchange, be-
cause the pro-
perty is altered.

Upon shewing cause against a new trial, in the above causes, Mr. Justice *Ashhurst*, before whom they were tried, reported as follows:

The *first* was an action for *money had and received*, brought to recover a sum of twenty-one pounds, paid by the plaintiff upon the exchange of a mare of his, for a horse of the defendant; which the defendant *warranted* to be sound, but which was clearly proved to be unsound at the time. Immediately upon discovering that the horse was unsound, the plaintiff sent it back, together with a letter, by a person who put the letter and halter into the defendant's hands, in the defendant's yard, but he refused to take them. The person, at the

the same time demanded the twenty guineas, and the plaintiff's mare given in exchange; but the defendant said he had sold her; that he would have nothing to do with the person sent by the plaintiff, and turned him out of his yard. Upon which the plaintiff brought both the above actions.

The *second* was an action of *trover* for the mare: both causes stood for trial in the paper together. As to the first, an objection was made at the trial to the form of the action, and I was very doubtful how far it was maintainable. But it was agreed that I should sum it up to the jury, and if they should be of opinion with the plaintiff upon the facts proved, then, instead of making a special case, it should be put in the form of a motion for a new trial. The jury found for the plaintiff. As to the second action, it was agreed that a verdict should be taken for the plaintiff, upon the evidence given in the first cause, but with liberty to move for a new trial; and it was understood between the parties, that the defendant should be entitled to the same redress in both causes, in case the opinion of the court should be in his favour, as if the whole had been stated in the form of a case.

Upon shewing cause, the question was, whether the above actions were rightly conceived? or, whether the plaintiff should not have brought a special action on the case? Mr. *Wheler*, for the plaintiff. Mr. *Newnham* for the defendant.

The court were of opinion that *both* actions were *misconceived*. 1st. The action for *money had and received*, with *no other count*, was an improper action to try the *warranty* *. 2d. The action of *trover* could not be maintained, be-

* Vide *Stuart v. Wilkins*, ante, and note the difference between a count for money had

had and received only, and an action of assumpsit, to try the warranty.

Tindal and others against Brown. E. 26 Geo. III. B. R. Durnford and East. 1 V. 167. If the holder give time to the acceptor of a bill, or drawer of a note, after it has been dishonoured, the indorser is discharged. Notice of a bill of exchange or promissory note, being dishonoured, must come from the holder. What is reasonable notice to the indorser of non-payment by the drawer of a promissory note or acceptor of a bill of exchange, is partly a question of fact, and partly a question of law.

cause the property was transferred by the exchange.—Accordingly a nonsuit was ordered to be entered up in each cause.

This was an action by the indorsees of a promissory note against the indorser.

The cause first came on to be tried at the sittings after *Easter* term, 1785, before Lord MANSFIELD, at *Guildhall*, when the jury found a verdict for the plaintiffs. On a motion for a new trial in last *Trinity* term, the facts appeared to be to the following purport: *that on the 21st of *August*, 1784, the note in question was made by one *Donaldson*, for 35l. 2s. payable six weeks after date; that on the 5th *October*, 1784, the day on which the note became due, allowing for the three day's grace, one *Howell* (the plaintiff's clerk) called on *Donaldson*, at ten in the morning, and, not finding him at home, regular notice of the demand of payment of the money contained in the note was left at the house of *Donaldson*; that on the 6th of the same *October*, between the hours of 10 and 11 in the forenoon, he called again on *Donaldson*, who promised that the said note should be taken up before the bank was shut on that day, within the banking hours, which were from 9 to 4 o'clock in the afternoon of each day. That the note not being taken up that day, he called again on *Donaldson*, on *Thursday*, the 7th, and not finding him at home, he was sent to the defendant *Brown*, to tender the note, who refused to pay it, saying the plaintiffs had made it their own.

* The facts are taken from a special verdict, afterwards found in this cause.

Donaldson

Donaldson proved at the trial, that immediately on his parting with *Howell*, on *Wednesday*, the 6th, he went to *Brown's* house, and not finding him at home, he left a message with his wife that the note was due, that he (*Donaldson*) could not pay it, desired that *Brown* would take it up, adding that he would make it good to him.

That all the parties lived at *Bristol*, within twenty minutes walk of each other.

After argument by *Lee* and *Morgan*, for the plaintiffs, and *Cowper* and *Baldwin*, for the defendant, the court delivered their opinion to the following effect.

LORD MANSFIELD.—On full consideration, I am now decidedly of opinion that there ought to be a new trial. It is of great consequence that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is *partly a question of fact*, and *partly a question of law*. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the post, &c. But wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty. I cannot form to myself an idea of the ground on which the jury went in giving this verdict. Did they conceive the rule to be that the holder might delay giving notice for two days, or what other time did they mean to allow him? Here an earlier notice might certainly have been given, as all the parties lived

lived within twenty minutes walk of each other. The bill was dishonoured on the 5th, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day; and the plaintiffs did not go at four that afternoon, but waited till the next day. It has

(a) Vide Dougl.
497.

been held (a), that where the party liable, does not live in the same place, the holder must write by the next post after the bill is dishonoured. It was well observed by the counsel, that the juries were obstinate in the case of

(b) Tr. 22 Geo.
III. B. R.

Metcalf and *Hall* (b), where they struggled so hard, in spite of the opinion of the court, to narrow the rule, that they held you must in certain cases demand payment on a banker's draft within an hour. Here the struggle is to give a greater latitude than is necessary. It was

(c) Vide Ball.
N. P. 274, 276.

once doubted (c) whether notice within fourteen days was not sufficient. For the sake of diligence and certainty, I am of opinion there should be a new trial.

WILLES, J.—I agree that there ought to be a new trial. New credit was given to the maker on the 7th, the plaintiffs clerk went first to *Donaldson* to demand the bill of him, and after that they sent it to the defendant. As to the notice, I cannot consider the notice given by the maker equal to that given by the indorser. The plaintiffs have not acted with legal diligence.

ASHHURST, J.—It is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty. The next day at the most, is as long as is necessary in a case circumstanced

circumstanced like this. If the parties live at a small distance, this is sufficient time: if at a greater, they should write by the next post. Notice means something more than knowledge; because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend *to pay*, but that he (the holder) does not intend to give credit. In the present case there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.

BULLER, J.—The numerous cases on this subject reflect great discredit on the courts of *Westminster*; they do infinite mischief in the mercantile world: and this evil can only be remedied by doing what the court wished to do in the case of *Metcalf* and *Hall*; by considering the reasonableness of time as a question of law, and not of fact. Whether the post goes out this or that day, at what time, &c. are matters of fact: but when those facts are established, it then becomes a question of law on those facts, what notice shall be reasonable.

As to giving time the holder does it at his peril. And that circumstance alone would be sufficient to decide this case. For in no case has it been determined, that the indorser is liable, after the holder of the note has given time to the maker.

With respect to notice, I concur in the opinion which has been given by the court, and particularly for the reason given by my brother ASHHURST. The purpose of giving notice is not merely that the indorser should know the *note* is not paid, for he is chargeable only in a secondary degree; but to render him liable you must shew that the holder looked
to

to him for payment, and gave him notice that he did so. A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as if in the present case the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged; because it would have amounted only to this, "the note made by *Donaldson*, and indorsed by you, is not paid, and I have given credit to *Donaldson* 'till to-morrow." Though there is no prescribed form of this kind of notice, yet it must import that the holder looks on the indorser as liable, and expects payment from him, that he may have his remedy over by an early application. Then it becomes his business to take up the note. But notice of having given credit to the maker, will discharge the indorser. The notice by another person to the indorser, can never be sufficient; but it must proceed from the holder himself.

The rule for a new trial being made absolute, This cause was heard a *second* time before *Buller, J.* at the sittings at *Guildhall*, after last *Hillary* term, when in addition to the evidence given on the former trial, one *Weeks*, the defendant's attorney, was called, who swore, that in a conversation which he held with *Donaldson*, on *Thursday* the 7th of *October*, concerning the note in question, *Donaldson* told him he was that moment come from *Brown's*, where he had left a message with *Mrs. Brown*, desiring her husband to take up the note; that the reason why he was so exact as to the particular day, and the expression made use of by *Donaldson*, was because he kept a minute of all his transactions; that his minute was con-

firmed in this respect by his memory; and besides, that at a meeting between the parties before the action was brought, this fact was admitted on both sides. This jury, which was a special one, likewise found for the plaintiffs.

Cowper having moved this term for a second new trial, on the ground, that this was a verdict against law,

Erskine now shewed cause, and admitted that it was not now to be disputed, that what should be considered to be a reasonable time, was a question of law; but contended, that in this case the plaintiffs had used due diligence, and had given the defendant notice within a reasonable time. That *Donaldson* ought to be considered as the agent of the plaintiffs for the purpose of giving notice to the defendant. That there was a contradiction as to the time when this notice was first given to the defendant, whether on the 6th or 7th of *October*, which contradiction arose from the testimony of *Weeks*, who was not produced at the former trial, which circumstance might have afforded the jury some room for suspicion: but this was a point proper for the determination of the jury who had decided it. That at all events, the court should be extremely cautious in granting a *third* trial; particularly as the sum in litigation was so small. That in *Metcalf and Hall*, which involved a similar question, the court had refused to grant a third trial.

The counsel on the other side were stopped by the court, who referred to their former decision, and added, that even if the application had been made to the defendant on the 6th, it would have been too late, because the plaintiffs had given credit to the drawer. That though it was true in general, that the court would refuse to grant

a new

a new trial, when the sum in litigation was small, yet that rule did not apply, where a verdict had been given *against law*. That the reason why the court refused granting a third trial, in the case of *Metcalf and Hall*, was, because the plaintiff had proved his debt under a commission of bankrupt, which had issued against the drawees of the bill, between the time of the verdict and the motion for a new trial.

Rule absolute.

This cause was tried a third time, and that the point might be solemnly settled, the parties consented to have a special verdict found, which was done according to the facts first stated, *Weeks's* evidence not making a part of it. *Morgan* was to have argued for the plaintiffs, but as the court of *B. R.* had given two decided opinions against his clients, he did not think proper to argue it before that court.— Judgment was therefore given for the defendant, and a writ of error was brought in the exchequer chamber, and argued by *Morgan* for the plaintiffs in error, *Baldwin* for the defendant. *Morgan* made two points; one, that the notice given by *Donaldson* was the same as if given by the plaintiffs, and that the defendant had sufficient notice: another, that whether the notice was or was not sufficient and reasonable, was a mere question of *fact*, and ought to have been determined by the jury, and therefore a *venire facias de novo* ought to be awarded.—The court determined against the plaintiffs in error upon both points, and affirmed the judgment of the king's-bench.

TROVER for fifty hogsheads, and one hundred and twenty tierces of sugar, and thirty puncheons of rum.

Caldwell and
others against
Ball. E. 26 G.
III. B.R. Durn-
ford and East.
1 V. 205.

On

On a motion to set aside the verdict, which had been given for the *defendant* in this cause, and to grant a new trial, WILLES, justice, before whom this cause was tried, at the last assises at *Lancaster*, made the following report.

The question arises upon two bills of lading signed by the defendant, who was captain of the ship *Tyger*, under one of which bills of lading the plaintiffs claim.

Thompson, the shipper of the goods in question, was a considerable planter in the island of *Jamaica*, and corresponded with *Fairbrother*, a merchant residing at *Liverpool*. Previous to the 19th *August*, 1784, *Fairbrother* had acted as the *general agent* or consignee of *Thompson*, but from that time his *general agency* ceased, in consequence of a power of attorney to *Dorothy Thompson* and *Bromfield*, which superseded his authority. From that time, whatever act was done by *Fairbrother* on behalf of *Thompson*, was by virtue of a special order or commission for that specific purpose.

The above-mentioned power of attorney to *Dorothy Thompson* and *Bromfield*, authorised them to raise money for the use of *Thompson*, whose affairs were then much involved, and to make a mortgage upon his estates in *Jamaica*. It likewise empowered them to enter into any contract that they should think fit for consigning and shipping any sugar, or produce, made on any of the plantations.

At the time that this power arrived in *England*, *Thompson* was indebted to the house of *Caldwell and Company*, the present plaintiffs, who were merchants of *Liverpool*, in the sum of 4000 l. By way of a security for this debt, *Dorothy Thompson* and *Bromfield* gave the plaintiffs a mortgage dated the 20th of *March*, 1785,

Where several bills of lading have been signed, of different imports, no reference is to be had to the time when they were signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment.—And where such bills of lading, tho' different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all.

for 7000 l. upon the plantations in *Jamaica*; and likewise entered into a covenant for the future consignment of *Thompson's* sugars to them.

By a subsequent indenture, dated 10th. of *May*, 1785, and executed between the same parties, after reciting the above-mentioned mortgage, it was declared, " that whereas
 " the sum of 4000 l. or thereabouts, part of
 " the said sum of 7000 l. at the time of the
 " execution of the said indenture, was actually
 " owing by the said *T. P. Thompson*, to the
 " said *C. Caldwell* and Company, for which
 " they have the bond of the said *T. P. Thompson*,
 " and others, and the further sum of 100 l.
 " has been also advanced to the said *T. Brom-*
 " *field*, as the attorney of the said *T. P. Thompson*,
 " and the remainder of the said sum of 7000 l.
 " was intended to have been so advanced;
 " but doubts having arisen as to the force and
 " validity of the power of the said *T. Brom-*
 " *field*, to charge with effect the said planta-
 " tion and premises, and it being uncertain
 " what sum of money the said plantation and
 " premises are already mortgaged for, and
 " what other circumstances affect the same,
 " it has been agreed that the said indentures
 " of lease and release, (meaning the before-
 " mentioned mortgage) shall be sent out to
 " *Jamaica*, to the correspondent of the said
 " *Charles Caldwell* and *Thomas Smyth*, to be
 " recorded in the said island, and for inform-
 " ation how the said estate is affected by former
 " incumbrances, and that so soon as the said
 " plantation, lands, and premises, are effec-
 " tually made liable to the payment of the
 " said sum of 7000 l. and interest, according
 " to the terms of the said indenture of release,
 " and the said *Charles Caldwell* and *Thomas*
 " *Smyth*,

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" *Smyth*, are well satisfied that the same are a
 " good and sufficient security for the said sum
 " of 7000 l. and interest; and are also satisfied;
 " that the said *Thomas Pepper Thompson* will
 " consign the produce of the said plantation to the
 " said *Charles Caldwell* and *Thomas Smyth*, ac-
 " cording to the terms of the said indenture of
 " release, then and not until then, the said
 " *Charles Caldwell* and *Thomas Smyth* are to
 " advance unto the said *Thomas Bromfield*, as
 " attorney for the said *Thomas Pepper Thompson*,
 " the remainder of the said sum of 7000 l.
 " And in the mean time no interest for more
 " than is or may be actually advanced, is to
 " be charged or payable. But it is fully un-
 " derstood amongst the parties, that the said
 " *Charles Caldwell* and *Thomas Smyth*, are not
 " to be under any obligation of advancing any
 " more money than they have done already,
 " until they are fully satisfied with the pro-
 " priety thereof, and are content to do so."

At the time this indenture bore date, the
 house of *France* and Company, merchants at
Liverpool, were also creditors of *Thompson*, to
 the amount of 3000 l. for money advanced
 to him some time before, through the hands
 of their agents in *Jamaica*, Messrs. *Coppell* and
Goldwin; and *Thompson*, to discharge this de-
 mand, had drawn two bills of exchange, bear-
 ing date the 28th July, 1784, upon *Dorothy*
Thompson and *Thomas Bromfield*, payable at
 ninety days sight, in favor of Messrs. *Coppell*
 and *Goldwin*, who indorsed the same to the
 order of *France* and Company.

Extract of a letter from Thompson to Fairbrother,
dated the 6th of Decemr., 1784, from Jamaica.

" I have now the pleasure to inform you,
 " that I have a most pleasing prospect of a
 Vol. II. M " crop,

“ crop, which, avoiding accidents, I hope
 “ will enable me to take up *those heavy bills*
 “ when due, which my sister (*Dorothy Thomp-*
 “ *son*) will inform you of, and for which I
 “ *shall ship 200 casks on the Tyger, Captain Ball,*
 “ who expects to sail in all next month.”

Extract of a letter from Thompson to Fairbrother,
dated Jamaica, 23d January, 1785.

“ I shall wait upon Messrs. Coppel and
 “ Goldwin, to desire them to write to Messrs.
 “ France and Company, relative to the bills
 “ drawn in their favor. We are making fine
 “ sugar, and a large quantity of it. I hope
 “ you will make Messrs. Caldwell and Company
 “ satisfied until I have the pleasure of seeing
 “ them, which will be soon, as I am, please
 “ God, determined to leave this island in all
 “ July next, in the packet.”

Extract of a letter from Thompson to Fairbrother,
dated Jamaica, 15th March, 1785.

“ I shall have on board the *Tyger* one hun-
 “ dred and seventy hogsheads and tierces,
 “ and thirty puncheons, most of which are
 “ already on board. She will sail the beginning
 “ of April.”

“ N. B. With respect to insuring what I
 “ shall have on board the *Tyger*, I shall leave
 “ it to your own option. Should she be long
 “ on her passage you might get insurance for
 “ 2000 l. as we could not well bear a loss
 “ just now.”

On the same day on which the last men-
 tioned letter from *Jamaica* was written to *Fair-*
brother, he, being applied to by Messrs. Caldwell
 and Company for payment of *Thompson's* debt,
 wrote the following answer to them.

“ Messrs.

" Messrs. Caldwell and Company,

" In consequence of your application to me for money on account of *Mr. Thompson*,
 " I am sorry to inform you, that I have nothing wherewith to pay. A letter from that gentleman acquaints me, that *he will ship two hundred casks of sugar and rum on board the Tyger, Captain Ball*. I will be obliged to you, if you will order insurance on these goods.

T. Fairbrother."

Liverpool, 15 March, 1785.

On the 18th of *March, 1785*, the defendant signed *the bills of lading* in question.

One of these bills of lading for the whole cargo, which was acknowledged to have been the first signed by the defendant, was to deliver to *Messrs. Thompson and Fairbrother, or their assigns*; this was indorsed by *Thompson* in *Jamaica*, and sent by him to *Fairbrother* in *England*, where it arrived on the 20th of *May*, inclosed in the following letter.

Jamaica, 18th March, 1785.

" I send you inclosed a bill of lading, for what goods I have got on board the *Tyger*.
 " This will acquaint you of my being obliged to assign the other bills of lading to *Coppel and Company*, for the security of the payment of the bills drawn in their favour, &c."

A short time after the receipt of this letter, *Fairbrother* indorsed the bill of lading above-mentioned to *Messrs. Caldwell and Company*, the present plaintiffs; who, after they were in possession of it, advanced two sums, amounting together to 219l. 13s. 8d. for the use of *Thompson*.

The other two bills of lading for different parts of the cargo, making up the whole together, were to deliver to the order of the shipper or his assigns, and indorsed by Thompson as follows: "Deliver the within to Messrs. Thompson and Fairbrother, provided they engage to pay the nett proceeds to Messrs. France and Nephew; otherwise, deliver them to the order of James France and Nephew, on account of Coppell and Goldwin."

These last bills of lading had been delivered into the hands of Coppell and Goldwin, by Thompson, at the time when he wrote the letter of the 18th of March, 1785, to Fairbrother, as appeared by that letter, and were afterwards received by France and Company, on the 6th of June, 1785, in a letter from Messrs. Coppell and Goldwin, dated 16th April.

Captain Ball, the defendant, arrived at Liverpool on the 19th of June, 1785, having on board his ship the goods in question.

The day after his arrival, the plaintiffs demanded the goods of him, when he acknowledged the bill of lading, but said that he could not deliver the goods without the consent of the owners of the ship, who were France and Company.

On the next day the plaintiffs saw France, and repeated their demands, tendering, at the same time, all charges of freight, &c. France said, that neither he nor the captain would deliver the goods, unless upon a promise that the nett proceeds should be paid to him. This was refused by the plaintiffs.

WILLES, J. then observed, that, on the trial, several points had been made by the plaintiffs.

1st, That

ist, That the captain had no right to retain the goods in question, for that he was liable in an action of trover on the bill of lading signed by him.

But in answer to it, he had considered this in reality as an action between the plaintiffs and *France* and Company, and that the defendant, who was captain of the ship, was merely a trustee for one or the other, and was indemnified in the mean time. That he was in a similar situation to a sheriff, when contrary demands are made by the assignees of a bankrupt and a creditor claiming under an execution.

2dly, It was insisted that the defendant had done wrong, in refusing to deliver the goods according to the first bill of lading signed, by which he had bound himself.

As to this point, he had left it to the jury to consider of, under the particular circumstances in which all the parties stood. He had represented to them, that the defendant was master of *France* and Company's ship, and was charged to deliver the goods to them by *Coppell* and *Goldwin*.

That the conduct of *Fairbrother* was in some degree culpable, in assigning the bill of lading over to the plaintiffs immediately after he had received it, against what he knew to be the design of his principal.

And that as the plaintiffs, and *France* and Company, were both fair creditors, and *bonâ fide* holders of the bills, he who had first got possession by a legal title, ought to be preferred; and that for this purpose the possession of *Coppell* and *Goldwin* was to be considered as the possession of *France* and Company.

3dly, It was objected, that *France* and Company were not creditors of *Thompson*, because the bills of exchange were not due, and therefore that they had no equitable lien on the goods.

But that was answered, by saying that the consideration for these bills had actually been advanced by *France* and Company.

4thly, It was insisted that the consignments of these goods was bound by the mortgage to the plaintiffs, executed by *Bromfield*, under the power of attorney.

This was answered, by saying that the mortgage did not affect this transaction, being subsequent in point of time; that at all events it was only a covenant which bound the covenantor personally.

Under these directions, the jury had given their verdict for the defendant, which he had no reason to disapprove of.

Scott, Wood and Law, shewed cause against the rule, and directed their arguments to two grounds, on one of which they supposed that the plaintiffs meant to rely.

1st, That the bill of lading indorsed to them, being actually signed before the other, vested such a property in them, as enabled them to maintain this action. Or,

2dly, That under the agreement to consign to them in the mortgage deed, they had a right to these goods.

They observed, that, in order to clear this transaction, it was necessary to consider the different relations of the parties to each other.

After *August* 1784, *Fairbrother* no longer acted as the general agent of *Thompson*, but under a special direction accompanying each cargo consigned to him: therefore he had no longer

longer the arbitrary disposition of *Thompson's* property. *Bromfield* was at that time appointed the *general agent*. The nature of this connection between *Fairbrother* and *Thompson*, was perfectly well known to the present plaintiffs. Previous to their getting possession of the first bill of lading, the plaintiffs had taken a mortgage on *Thompson's* estate, for 7000 l. for a debt of 4000 l. only.

At this time, *France* and Company were also creditors of *Thompson*, upon bills of exchange drawn by him, to the amount of 3000 l. for money which had been advanced to him, through the hands of *Coppell* and *Goldwin*, who were agents of *France* and Company. Under these circumstances the bills of lading were signed, *Thompson* intending that *Fairbrother* should apply these goods in discharge of the bills of exchange which were in the possession of *France* and Company.

But the plaintiffs contend, that the bill of lading which consigned the goods to *Fairbrother*, having been actually first signed by the defendant, and *Fairbrother* having afterwards indorsed it over to them, the defendant is concluded by his own act. In answer to this, they observed, that *Fairbrother* being merely the agent of *Thompson* for a specific purpose, and not having a general power over the consignment, which was known to the defendant, it was nothing more than an undertaking by him to deliver the goods to *Fairbrother*, for the purpose of being disposed of according to directions from *Thompson*: and therefore, as between *Thompson* and *Fairbrother*, under whom the plaintiffs claim, *Fairbrother* had indorsed this bill of lading over to the plaintiffs, without any authority, and against con-

science: and there being a general communication between *Fairbrother* and the plaintiffs, that they either had, or might have had notice, unless they were guilty of great negligence. That these goods were originally devoted to take up the bills which were in the possession of *France and Company*.

But even supposing that any stress is to be laid upon the plaintiffs bill of lading having been the first actually signed, yet that will have no weight under these circumstances; for, according to the nature of *Fairbrother's* authority, if *Thompson* had merely sent him a letter, ordering him to deliver the nett proceeds of the goods to *France and Company*, that would have been sufficient. Then there is no good ground to represent these bills of lading as inconsistent; for the second bill of lading amounted to no more than a special appropriation of the goods which were to be delivered to *Fairbrother* under the first bill of lading, and came in lieu of a letter, or other specific order from *Thompson*. The defendant therefore, being apprised of the mode of dealing between *Fairbrother* and *Thompson*, only bound himself to deliver the property to *Fairbrother*, as the special agent of *Thompson*, and *Fairbrother* was afterwards to deliver the nett proceeds according to further directions from *Thompson*, which were contained in the second bill of lading. Defendant, therefore, has complied with his duty, for the goods were offered to be delivered to the plaintiffs, provided they would promise to pay the nett proceeds to *France and Company*.

It is not contended that any money was advanced by the plaintiffs, at the time of assigning over the bill of lading to them; but it is
said

said that two small sums were afterwards advanced by them, on the credit of the bill of lading; but it is much to be doubted whether the money was advanced on that account; for the plaintiffs had, at that time, a large mortgage on *Thompson's* estate, which was more than sufficient to cover their debt. And indeed the sums advanced were so small, that they could only be colourable, for they must have known that they were not sufficient to answer the pressing demands of *Thompson*. Besides, if the fact were so, it was done at their own peril, under notice of *Fairbrother's* limited authority; for, before that time, they had treated with *Bromfield* as the general agent of *Thompson*.

Fairbrother was, during all this transaction, in the habit of communicating his letters to the plaintiffs. In the letter dated 6th *December*, 1784, *Thompson* took notice that he had heavy bills outstanding against him, for the payment of which, he should ship two hundred hogheads on board the *Tyger*, Captain *Ball*. It was clear, therefore, from that letter, which the jury had a right to presume that the plaintiffs had seen, that the goods in question were sent to *Fairbrother* to take up those bills, which were in the possession of *France and Company*, for there were no other heavy bills except those. The plaintiffs must have known, therefore, that there was a special lien meant to be fixed on this property; and the letter of the 23d *January* confirmed it, because it shewed that *Thompson* held the same intention that he had manifested in the former letter; and is also very important, because it proves negatively, not only that *Thompson* had no idea of sending the goods to the plaintiffs,

plaintiffs, but that he had also *expressly intended* to exclude them; for he desired *Fairbrother* to call upon them, and make them satisfied 'till he came to *England*.

No argument in favour of the plaintiffs can be drawn from the circumstance of their having insured this cargo by the direction of *Fairbrother*, he himself having no authority from *Thompson* to order any such insurance 'till the receipt of the letter of the 15th *March*, which was long afterwards: and it was gross negligence in the plaintiffs, knowing *Fairbrother's* limited commission, not to demand a sight of his authority for making such an order.

It was therefore for the jury to determine, under all these circumstances, whether the plaintiffs had or had not actual notice, that these goods were consigned to *Fairbrother*, for the special purpose of paying the bills in the hands of *France and Company*; and the verdict has determined that they had.

Hitherto this case has only been considered on the presumption of fraud or wilful negligence on the part of the plaintiffs: but, in point of law, this property was vested in *France and Company*, before the plaintiffs were in possession of their bill of lading. All the bills of lading had an existence when the letter of the 18th of *March* was written. *Thompson* had then put the second bill of lading into the hands of *Coppell and Goldwin*, for the use of *France and Company*. The first bill of lading was at that time, and long afterwards, in abeyance, it not having reached *Fairbrother*. Therefore not only the right of property was vested in *France and Company* in point of law, but they were also in possession in point of

of fact, for the goods were actually on board a ship belonging to them.

At all events, the agent could do no more than the principal. Had *Thompson* himself been in *England*, he could not have delivered this cargo to the plaintiffs, after *Coppell* and *Goldwin* had been put in possession of the bill of lading.

2dly, As to the mortgage, allowing it to have been warranted by the power of attorney, it could make no difference in this case, as between the plaintiffs and *France* and Company; for the covenant to consign the produce of *Thompson's* estate, could only be binding upon him, and could not affect *France* and Company, who were in possession under a legal title in the mean time. But this mortgage was not executed pursuant to the power of attorney. The power was expressly given in order to raise money for *Thompson*, and not for the purpose of securing an old debt.

Wilson, *Chambre*, and *S. Haywood*, *contra*, contended, that as the plaintiffs were in possession of the first bill of lading, which was signed by the defendant, it is conclusive as against him. A bill of lading is as negotiable as a bill of exchange. It is an undertaking by the captain, to deliver the goods specified therein, either to the consignee, or to his assigns. The defendant, therefore, having signed one bill of lading, acted fraudulently in signing another, which was inconsistent with the first. But in every case where there are two inconsistent bills of lading, the first binds the captain and owners. If the other bills of lading had been of the same tenor and date as the first, *Coppell* and *Goldwin* could have derived no title under them, because, in order to negotiate

goriate them, they ought to have been indorsed by *Fairbrother* as well as *Thompson*.

Admitting that the defendant is to be considered as a trustee, yet he is trustee for those persons to whose order he himself signed the bills of lading; and if, after having signed one, he enters into a subsequent contract inconsistent with such trust, he is guilty of a breach thereof, for which he is personally answerable. He is not in a similar situation to a sheriff, who knows not whom to prefer of two contending parties, whose several claims he is not privy to, and therefore comes to the court for an indemnity, or seeks it from the parties: for here these contradictory claims are set up in consequence of the defendant's own wrong, and could not have happened without. The defendant, therefore, has made himself liable.

But even considering this merely as a question of right between the plaintiffs and *France and Company*, the plaintiffs title ought to be preferred, because they derive it under the first bill of lading.

WILLES, J.—Gave no further opinion, but declared himself satisfied with the verdict.

ASHHURST, J.—I do not think, upon the whole of the transaction, that this can be considered as a verdict either against evidence or law, and therefore there ought not to be a new trial.

There is no reason for saying that either the plaintiffs, or *France and Company*, are not equitable holders of the several bills of lading. When equity is equal between the parties, a legal title must prevail. This reduces the question to a mere point of law. I shall put out of the question all the letters, which

ought not to prejudice the plaintiffs, because they were not proved to have had actual notice of them; neither are they guilty of negligence, in not having endeavoured to learn their contents. They knew that *Fairbrother* acted as the agent of *Thompson*, and had no reason to be suspicious of his authority.

Upon the merits of the case, the leaning of my inclination would rather be in favour of the defendant, whom I consider as the servant of *France* and Company, than in favour of the plaintiffs, because they have got another security.

But in point of law also the plaintiffs are not entitled to recover. Three bills of lading were signed by the captain. The first is a general one, consigning the whole cargo to the order of *Thompson* and *Fairbrother*; the other two are partial consignments of different parts of the same cargo to the order of the shipper. If it could be proved, or there was any reason to infer, that the defendant meditated a fraud on any person, that would afford an argument as against him; but no fraud can be presumed here.

I do not see, indeed, the reason of making these bills of lading in a different form; but the captain might suppose them to be the same in effect, for he knew that *Fairbrother* was merely an agent for *Thompson*. Therefore I do not think that they can be said to be inconsistent; they are all of them in substance to the order of the shipper. Whoever, then, was first in possession of either of these bills of lading, had the legal title vested in him.

It appeared by the letter of the 18th of *March*, that at that time *Thompson* had indorsed two of the bills of lading to the agents

of

of *France* and Company. In my opinion, that was an immediate transfer of the legal interest in the cargo; and that same letter, which also conveyed the other bill of lading to *Fairbrother*, gave him notice of this indorsement.

It was argued, that the defendant was bound to deliver the cargo according to his undertaking; but as he knew of this indorsement to *Coppell* and *Goldwin*, he considered himself bound to deliver the cargo according to that bill of lading, which was first possessed by one of the parties. He then concluded, that he should fulfil his undertaking by delivering to the order of the shipper. As to the plaintiffs being in possession of the bill of lading under which they claim, before the other two arrived in *England*, the time of their arrival cannot vary the case, for the legal title was vested in *Coppell* and *Goldwin*, by their being indorsed to them.

BULLER, J.—Several objections have been made to this verdict, but the case is confined to a very narrow compass.

The first objection was, that the defendant had no right to withhold the goods, after demand made by the holder of the bill of lading. The answer given to it was, that he was indemnified, and that it ought to be considered as an action between the plaintiffs and *France* and Company. But I do not think that the doctrine of indemnity applies to such cases as these. Besides, it always applies against a defendant, and not for him. If it appears that a defendant stands in the place of a third person, he shall not be permitted to avail himself of any objection against the merits of the case, which such third person could not have availed himself of.

The

The second objection was, that, as there were different bills of lading, the defendant was bound to deliver the cargo according to the first bill of lading actually signed.

This being the real point of the case, I shall reserve it till last.

Third objection. That as the plaintiffs and *France* and Company were *bonâ fide* holders of these bills of lading, they who first got possession, as between these parties, were to be preferred.

But bare possession conveys no title, as between persons claiming under different rights. The question here is, who has the *legal* title? For the person who first gets possession, under the legal title, must prevail.

4thly, That *France* and Company were not creditors to *Thompson* at the time that the bills were indorsed to them. But that is not so: for they stood in the situation of payees of the bills of exchange, for which they had given a valuable consideration.

The last objection was, That the plaintiffs were entitled under the covenant contained in the mortgage, to consign to them.

The answer given to that was right: that the mortgage had nothing to do with this question. It was subsequent to the transaction; and, besides, it was only a covenant to consign, which could not bind third persons.

Now as to the principal point, it is material to consider the nature of a bill of lading. It is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee. It is now clearly settled

that goods at sea may be so assigned. This doctrine is laid down in *Evans and Marlett*, 1 Lord Raym. 271. and is recognized by Lord Mansfield in *Wright* and another v. *Campbell* and another. 4 Burr. 2051.

It is argued that the captain must be answerable, at all events, in this action, because he signed the first bill of lading to the order of *Thompson* and *Fairbrother*, who indorsed it to the plaintiffs.—I think it very material to consider who *Fairbrother* was. He had no interest in these goods; and he was known to all the parties, to be the agent of *Thompson*. Then *Fairbrother* must be considered as *Thompson* himself. The bills of lading were all to the order of *Thompson*: he had then the absolute controul over the goods, and might have unshipped them if he had so pleased: so that they are not like goods consigned to a third person, for they remained under the power of *Thompson* all the time, 'till he indorsed the bills of lading. If *Thompson* and *Fairbrother* are to be considered as the same person, it is the same as if the bills of lading were to the order of *Thompson* alone. Then the question is, who has the prior right under him?

It was said by the plaintiffs counsel, that the defendant was the agent of *France* and Company, and that they must be taken to know what he did; but that makes against the plaintiffs: for at the time when *Thompson* assigned the two bills of lading to *Coppell* and *Goldwin*, the defendant knew that he had the other in his hands, and could not, therefore, have assigned it to any other person. The defendant then acted fairly; and it could only happen by the subsequent misconduct of *Thompson*, namely, by his afterwards indorsing

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one of the bills of lading to another party, that any difficulty could arise.

Then the question is, whether this bill of lading, being made in favour of *Thompson* and *Fairbrother* jointly, can be distinguished from one made in favor of *Thompson* only? I think it cannot, because *Fairbrother* is known to the parties to be the agent of *Thompson*.

As, therefore, this transaction is to be considered in the same light as if all the bills of lading had been made to the order of *Thompson* alone, how does the question stand as between the plaintiffs and *France* and Company? Both parties claim under *Thompson*: but *France* and Company have the first legal right; for two bills of lading are first indorsed to them, and the letter which conveyed the other bill of lading to *Fairbrother*, apprized him at the same time of this indorsement.

Rule discharged.

This was an action for money paid, laid out, and expended, tried before *Buller*, J. at the sittings after last *Easter* term, at *Guildhall*, when a verdict was found for the plaintiffs. The circumstances were these.—One *Taubert* sent an order to the defendants for goods, and desired that they would draw a bill on the plaintiffs for the value, which the defendants accordingly did, after they had sent the goods. The plaintiffs, in a letter written to the defendants, on the 23d *September*, said, that they could not accept the bill on account of *Taubert* at present, because they (the defendants) had sent a larger quantity of goods than were ordered; adding, that they had written to *Taubert* for further directions. Two days afterwards the defendants wrote to the plaintiffs, pressing that the bill might be taken up; and on the 28th

Smith and another against Nisfen and another. T. 26 Geo. III. Durnford and East. 1 V. 269. Upon a request to A. to accept a bill, and draw upon B. for the like sum, the mere act of drawing upon B. does not amount to an acceptance.

of the same month received for answer, that the plaintiffs had written to *Taubert*, and were waiting for his answer before they could accept; and that they had desired the holder to keep the bill in the mean time. On the 14th *October*, *Taubert*, in a letter to the plaintiffs, took notice, that the orders had been exceeded, but desired that they would accept the bill, and draw upon *Govertz*, at *Hamburg*, for the amount. In consequence of which, the plaintiffs drew on *Govertz*, who refused to accept, and afterwards the plaintiffs paid the bill for the honor of the drawer; to recover back the amount of which, this action was brought.

Wilson now moved for a rule to shew cause, why the verdict which had been given for the plaintiffs should not be set aside, and a verdict entered for the defendants, upon the ground that the plaintiffs had actually accepted the bill drawn upon them. He admitted that, notwithstanding *Taubert's* letter, the plaintiffs might have chosen whether they would accept or not; but he contended, that they had only a right to draw on *Govertz*, upon condition that they themselves should accept the bill drawn upon them, and therefore that their drawing upon *Govertz* was an implied acceptance of that bill. But the court held, that what the plaintiffs had done did not amount to an acceptance, for they never meant to make themselves liable, unless the bill drawn upon *Govertz* was accepted and paid; and they would not imply a contract which the parties themselves refused to enter into.

Rule refused.

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EJECTMENT by the lessors of the plaintiff, who are the treasurer and antients of *New-Inn*, to recover a set of chambers in the inn.

In *February* last, *Richards*, who was tenant for life of the chambers in question, agreed with *J. Chambers* for the sale of his life estate: but there being a clause in *Richards's* grant that he should not sell or assign without the licence of the treasurer and antients of the inn, application was made to them for that purpose; who at a pention held on the 23d of *February*, 1786, ordered "that *Richards* should be at liberty to surrender his chambers in favor of *J. Chambers*, for his life, the latter having agreed to take them for the purpose of studying the law, and that he (*J. Chambers*) should be admitted thereto upon the usual payment, and subject to the usual terms and conditions." In consequence of this, *Richards* executed a conveyance to *J. Chambers*, by which he surrendered, granted, and yielded up the said chambers, &c. and all his estate, right, title, interest, and property therein, to *J. Warry*, the treasurer, and the rest of the antients, to the end, intent, and purpose, that the said treasurer and antients, or their successors, might grant the said chambers and premises, according to the custom of the said society, unto *J. Chambers*, one of the members of the said society, and who had agreed to take the said chambers and premises, for and during the term of his natural life, at and under such yearly rents, provisos, conditions, and agreements, as they should think fit. *J. Chambers* was to pay 20l. yearly to the society by quarterly payments, from the *Christmas* preceding. Immediately on the execution of the surrender, he entered into

Doe, on the demise of *Warry*, and others, against *Miller* and another, executors of *Chambers*. M. 27 G. III. B. R. Durnford and East. 1 V. 393. A surrender of chambers in *New-Inn* to the treasurer and antients of the society, made with their assent, to the intent that they might grant the said chambers to a purchaser, passes the estate to such purchaser before admission. Admission is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only for the purpose of signifying the assent of the society that the grantee should become a member of the inn.

possession, and continued therein till the 28th of *March* last, when he died. There being no meeting of the treasurer and antients between the time of the surrender by *Richards* and the death of *Chambers*, the admission of the latter was not made out by the society, neither did *J. Chambers* pay the alienation fee of five guineas, which is due to the society, on the transfer or sale of chambers. But it was proved at the trial that he might have had his admission if he had applied for it. The surrenders to the society by the tenants for life are always upon the usual stamps used for deeds; and the admissions are entered only in the society books, without any stamp.

On these facts the jury found a verdict for the lessors of the plaintiff.

Richardson, on a former day, had obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that wherever an estate passes by surrender and admission, the latter is absolutely necessary to perfect the conveyance of the estate. And he likened this to the case of copyholds, where admittance is necessary, in order to vest the estate in the surrenderee. *Co. Copyb.* 70. If grantee enter before admittance he is punishable as a trespasser, and if he surrender to the use of another it is void. *Co. Copyb.* 51. *Yelv.* 44. 5. So where surrenderer or surrenderee and the two tenants into whose hands the surrender was made died before the presentment of the surrender, it was held that the heir of the surrenderer might enter. *Co. Copyb.* 69. 3. *Bulst.* 214. *Cro. Jac.* 403. *Bridg.* 52. *Gib. Ten.* 263. 2 *Wils.* 13. It was held that admittance is as necessary to a surrender, as inrollment to a bargain and sale, or livery to a feoff-

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a feoffment. That though, by the case of *Vaughan ex dem Atkins v. Atkins* (a) admission, when granted, has relation back to the time of the surrender, yet in this case there having in fact been no admission, the estate continued in the surrenderer. (a) 5 Burr. 2764.

Gibbs was to have shewn cause this day against the rule, but the court being of opinion that the cases relating to copyholds were not applicable to the present, delivered their opinions, without hearing him, to the following effect.

ASHHURST, J.—In whatever light this case is considered, the lessors of the plaintiff are entitled to recover. For if the surrender were not good, so as to pass the estate to the surrenderee, the society are entitled to the possession of the chambers as against the defendants, because they were surrendered into their hands; and the defendants, as executors of the surrenderee, can have no colour of right to them. But if the surrender were good, then the testator having only a life estate in them, they reverted of course to the society upon his death.

This cannot be considered as a copyhold or customary estate. For the surrender which is made to them upon every alienation is a mere form introduced for their own convenience, for the purpose of preventing improper persons from being admitted into the society. Immediately upon this surrender they became trustees for the testator. The equitable estate was vested by that act in him, and the legal estate in them.

BULLER, J.—There is a manifest distinction between this case and that of copyholds. In the latter case there must be an admittance as

well as a surrender, because admittance is necessary to pass the legal estate. But this is a bare trust. This is not a customary estate; but a freehold interest. *New-Inn* is a part of the *Middle-Temple*, who are trustees for the inn; and the society themselves are merely trustees for the persons holding the chambers. As to the admittance which it has been contended is essential to the completion of a purchaser's title to chambers, that is only an assent on the part of the society that the particular person should become a member of it. For every person, on purchasing chambers, covenants that he will not assign without giving notice to the inn, of the person to whom he is about to assign, that they may either approve or disapprove of the intended purchaser, and that assent is written on unstamped paper, and conveys no title. It is the surrender which passes the whole interest.

Rule discharged.

Brock against
Richardson. M.
27 G. III. B.R.
Durnford and
East. 1 V. 427.
If a modus be
not proved as
laid by the plain-
tiff in a suit in
prohibition,
there must be a
verdict for the
defendant. But
if any modus be
found, though
different from
that laid, that
is a ground for
the court to re-
fuse a consulta-
tion.

This was a suit in prohibition; and the question was, whether within the chapelry of *Witton Gilbert* there is a modus for every inhabitant to pay three half-pence for every milch-cow *at the time of calving*, in full satisfaction for the tithe of calves?

At the trial of this cause at the last assizes at *Durham*, before *Heath, J.* there was no contrariety of evidence; and the jury found the modus, with this variance, that it was payable *at Easter, and that it did not extend to certain lands within the chapelry*, called the *Copse lands*, consisting of five farms, which were exempted from the payment of these and all other tithes. Verdict for the plaintiff, with liberty to move to set it aside in this court, without costs.

Wood

Wood having moved to set aside this verdict, on the ground that, as this was a claim by prescription, the jury ought to have found the modus as laid in the declaration, or not at all;

Chambre now shewed cause. The variance between the modus laid and that proved is no ground for a new trial, or to entitle the defendant to a verdict. An issue in prohibition to try a particular modus is extremely different from issues in other suits; for, whether one sort of modus or another be found, it is equally a reason to warrant the prohibition (*a*). The very ground on which a prohibition is prayed for, is a suggestion that the ecclesiastical court is proceeding to try a question of which they have no cognizance. The fact which is tried in suits in prohibition is merely for the information of the court. This is in some respects like an issue directed by the court of chancery to try a particular custom, which is merely for the information of the chancellor, and which may be indorsed specially on the *posse*, according to the truth of the fact. He was then stopped by the court, and

(*a*) *Dyer* 170, 1.
Hob. 192.
1 Vent. 32.

BULLER, J. said it was too clear for any further argument. The authorities cited are directly in point, as far as they go. It appears from them that no consulation ought to be awarded: but it is equally clear that the verdict must be entered for the defendant.

In order to try a particular modus, one party alledges, and the other denies, the existence of it: that is the only issue on the record to be tried. As the plaintiff therefore has failed in proving the modus as alledged in pleading, the verdict must be entered specially for the defendant, who is entitled to his costs. But though the modus be not found, as laid, yet

if *any* modus be found, that is a sufficient ground for refusing a consultation.

Per curiam. The verdict must be entered specially for the defendant; and no consultation will be awarded.

Turner v. Winter
H. 27 Geo. III.
B. R. Durn. and
East. 1 V. 602.
A patent is void
if the specifica-
tion is ambiguous
or gives direc-
tions which tend
to mislead the
public. The
patent was for
producing a yel-
low colour, for
painting in oil or
water, and ma-
king white lead,
and separating
the mineral al-
kali, from com-
mon salt, all by
one process.

* Specification.

This was an action on the case, brought against the defendant for infringing the plaintiff's patent, which was granted to him for producing a yellow colour, for painting in oil or water, and making white lead, and separating the mineral *alkali* from common salt, all by one process. On the trial before *Buller, J.* at the last sittings at *Westminster*, a verdict was found for the *plaintiff*: and on a motion to set aside that verdict and grant a new trial, these facts were reported. The plaintiff within the usual time had enrolled the following specification *; Take any quantity of lead, and calcine it, or *minium*, or red lead, litharge, lead ash, or any calx, or preparation of lead, fit for the purpose; to any given quantity of the above-mentioned materials, add half the weight of sea-salt, with a sufficient quantity of water to dissolve it, or rock-salt, or sal gem, or fossil-salt, or any marine salt, or salt-water proper for the purpose; mix them together by trituration 'till the lead becomes impalpable, or sufficiently comminuted. When the materials have been ground, let them stand for twenty-four hours, in which time the lead will be changed to a good white, and the salt decomposed; if not, the trituration must be repeated, with the farther addition of salt, 'till the white colour be obtained; the decomposition of the salt may also be brought about by digestion or by calcination. The materials may be suffered to remain together, before the *alkali* is separated by the addition of water,

for

for a longer time than is specified above, according to the discretion of the operator, and the end he wishes to obtain. The yellow colour is produced by calcining the lead after the alkali has been separated from it 'till it shall acquire the colour wanted: this will be of different tints according to the continuance of the calcination, or the degree of heat employed. The white lead must be finished by repeated ablutions, and by bleaching it 'till the white be made perfect.

On the part of the plaintiff it was proved, that the first effect of the process was the separating of the mineral *alkali* from common salt; that that produced white lead, and that by continuing the process to a certain degree, and afterwards exposing the matter, the yellow colour was produced. That as the specification required the heat to be continued 'till the colour was obtained, any person trying the experiment would necessarily be led to fusion. That a chymist would see by the specification, that if less heat would not answer the purpose, he must go on to fusion. The difference between fusion and calcination, both of which proceed from different degrees of heat operating upon the subject matter, was, that the substance to be calcined continued in a solid form; whereas fusion is a liquid state to which the substance may be reduced by continuing the heat. Instances were produced by persons who had made the colour by the help of the specification, after trying some experiments. In trying those experiments *minium* had been fused in the first instance. The white lead produced by following the directions in the specification was not what was sold as such; but a white substance, the basis of which was lead.

Objections to
the specification.

For the defendant it was proved, that the patent colour could not be made by following the directions of the specification. For calcination was not sufficient to produce the effect intended; it was necessary to go on to fusion. That, as it appeared upon the specification, *minium* or red lead might be considered most convenient for the purpose, because a previous process was necessary to reduce lead to *minium* or litharge, before the other parts of the process were to be begun; *minium* and litharge differing only in having undergone different degrees of calcination. But that *minium* would not produce the effect unless first fused. And that if red lead were calcined, the experiment would not succeed without fusion: whereas, according to the terms of the specification, fusion should be cautiously avoided. That the specification was calculated to mislead also with respect to the salts. For *fossil salt* is a generic term, including all mineral salts: but only one species of fossil salt, namely *sal gem*, has marine acid, without which the colour could not be produced. That several persons had tried to make white lead by the specification, but had not succeeded. They could only produce a greyish white powder, quite unfit for painting, and not merchantable.

Objections at
the trial.

Mr. J. BULLER,—after reporting these facts, observed, that at the trial three objections had been taken to the specification. 1st, That, after directing that lead should be calcined, it directed another ingredient to be taken, which would not answer the purpose, namely, *minium*. Neither was it said that the *minium* should be calcined or fused: but if it had any reference to the preceding words, then it should be calcined, which would not produce the effect,

fusion

fusion being necessary. 2dly, That "fossil salt" was improperly mentioned. There were many kinds of fossil salt, only one of which, namely, "*sal gem*," would answer the purpose; because it must be a *marine salt*. 3dly, That all these things put together did not produce the thing intended. And that the patent was for an invention to do three things in one process, whereas one of them, namely, white lead, could not be produced at all; for that a white substance like lead remained, applicable only to some of the purposes of common white lead. The learned judge then said that at the trial he had told the jury, that if either of these objections were well founded, it would avoid the patent.

Erskine and *Piggott* shewed cause against the rule for granting a new trial, and contended, that in actions for infringing patents, it is not necessary for the plaintiff to give any evidence to shew what the invention is, but that it is incumbent on the defendant, if he objects to the specification, to shew that it is defective; and that persons acquainted with the subject, could not by the assistance of the specification, effect the thing intended. The consideration, which the patentee gives for his monopoly, is the benefit which the public are to derive from his invention, after his patent is expired; and that benefit is secured to them by means of a specification of the invention. But it is not necessary that that specification should be such, as that persons unacquainted with the terms of art, which must necessarily be used in writing it, should be able to understand it. It is sufficient if persons of skill can understand the process, by means of the specification,

tion, so as to keep alive the discovery, after the patentee's exclusive title is expired.

The first objection which has been raised against the sufficiency of this specification has no weight: for though the direction to calcine is applicable to all the ingredients in the first part of the description, yet scientific persons would instantly discover what degree of heat was necessary to be used to each of those ingredients; and that *minium*, being already a calx, must be fused. 2dly, The heat is ordered to be continued 'till the experiment succeeds, and the colour is produced. Fusion is a necessary consequence of continuing the heat; and this direction would be sufficiently understood by all persons acquainted with the subject.

As to the second objection, with respect to the "fossil salt," the specification begins with "sea salt," which is the genus: then it afterwards states not "*any* fossil salt;" but "fossil salt," or "*any marine* salt;" the "*marine salt*" is therefore the basis of the experiment; so that no *fossil salt* but what is likewise a *marine salt*, can be taken under this description.

The answer to the third objection is, that a species of white lead is produced, though not the common ceruse; and the patent does not profess to make the common white lead. Besides the making of white lead was not the subject of the present action, which was for making the yellow colour, which accounts for the plaintiff's not being prepared to prove this part of the specification. Upon the whole, this was a mere matter of evidence, as to the sufficiency of the specification, upon which the jury have exercised a sound discretion.

Bearcroft,

Bearcroft, in support of the rule, was stopped by the court.

ASHHURST, J. — I think that, as every patent is calculated to give a monopoly to the patentee, it is so far against the principles of law, and would be a reason against it, were it not for the advantages which the public derive from the communication of the invention, after the expiration of the time for which the patent is granted. It is therefore incumbent on the patentee to give a specification of the invention in the clearest and most unequivocal terms of which the subject is capable. And if it appear that there is any unnecessary ambiguity affectingly introduced into the specification, or any thing which tends to mislead the public, in that case the patent is void. Here it does appear to me, that there is at least such a doubt on the evidence, that I cannot say this matter has been so fully and fairly examined as to preclude any farther investigation of the subject. Three objections have been made to this specification. The first is, that in the specification the public are directed “to take any quantity of lead, and calcine it, or *minium*, or red lead;” from whence it is inferred that *calcining* is only to be applied to *lead*: I confess if the objection had rested here, I should have entertained some doubt.

The next objection is, that in the subsequent materia's to be added, the public are directed to add “half the weight of sea salt, or sal gem, or fossil salt, or any marine salt.” Now “fossil salt” is a generic term, “including sal gem” as well as other species of fossil salt. And I understand that sal gem is the only one which can be applied to this purpose; so that throwing in *fossil salt* can only
be

be calculated to raise doubts and mislead the public. That word could not have been added with any good view: it must produce many unnecessary experiments; therefore in that respect the specification is not so accurate as it ought to have been. Another objection was taken as to the white lead; to which it was answered, that the invention did not profess to make common white lead. But that is no answer: for if the patentee had intended to produce something only like white lead, or answering some of the purposes of common white lead, it should have been so expressed in the specification. But in truth the patent is for making white lead and two other things by one process. Therefore if the process, as directed by the specification, does not produce that which the patent professes to do, the patent itself is void. It is certainly of consequence that the terms of a specification should express the invention in the clearest and most explicit manner; so that a man of science may be able to produce the thing intended, without the necessity of trying experiments.

BULLER, J.—Many cases upon patents have arisen within our memory, most of which have been decided against the patentees, upon the ground of their not having made a full and fair discovery of their inventions. Wherever it appears that the patentee has made a fair disclosure, I have always had a strong bias in his favour, because in that case he is intitled to the protection which the law gives him. How far that law, which authorises the king to grant patents, is politic, is not for us to determine. When attempts are made to evade a fair patent, I am strongly inclined in favour of the patentee; but where the discovery

is not fully made, the court ought to look with a very watchful eye, to prevent any imposition on the public. Then the question is, whether the present plaintiff has made a fair discovery? I do not agree with the counsel, who have argued against the rule, in saying, that it was not necessary for the plaintiff to give any evidence to shew what the invention was, and that the proof that the specification was improper lay on the defendant; for I hold that a plaintiff must give some evidence to shew what his invention was, unless the other side admit that it has been tried and succeeds. But wherever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification. Now in this case no evidence was offered by the plaintiff to shew that he had ever made use of the several different ingredients mentioned in the specification; as for instance, *minium*, which he had nevertheless inserted in the patent; nor did he give any evidence to shew *how* the yellow colour was produced. If he could only make it with two or three of the ingredients specified, and he has inserted others which will not answer the purpose, that will avoid the patent. So if he make the article, for which the patent is granted, with cheaper materials than those which he has enumerated, although the latter will answer the purpose equally well, the patent is void, because he does not put the public in possession of his invention,

invention, or enable them to derive the same benefit which he himself does.

As to the first objection which has been taken with respect to the *minium*: it was not pretended, by any of the plaintiff's witnesses, that he ever made use of *minium*. And it was proved by the defendants witnesses, that from the specification they should be led to use *minium*, because *minium* is lead already calcined, which is what the specification directs in the first instance. But *minium* will not answer the purpose. Then as to fusion: it is said that the public are directed, by the words of the specification, to continue the heat till the effect is produced; which must necessarily lead to fusion, though fusion is not expressly mentioned. But that is no answer to the objection: for the specification should have shewn by what degree of heat the effect was to be produced. Now it does not mention fusion; and, as one of the witnesses said, in order to produce the effect, "you must go out of the patent;" for fusion is beyond calcination, and in some sense contrary to it; and, by mentioning calcination, it should seem that fusion was to be avoided.

The next objection was as to the salts. "Fossil salt" is mentioned, as a distinct species of salt, and many other salts are also mentioned, as indifferent whether one or the other be used. But it was proved that fossil salt was a generic term, including several species; and that "*sal gem*" was the only species of it which would answer the purpose; because none of the others contained a marine acid, which was essential.

There was no contradiction by the witnesses on the third objection: for the most that the plaintiff's

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plaintiff's witnesses said, was, that, following the specification, the experiment only produced a white substance like lead.

Now, on either of these grounds, the patent is void. Because if the patentee says, that by one process he can produce *three* things, and he fails in any one, the consideration of his merit, and for which the patent was granted, fails, and the crown has been deceived in the grant. Slight defects in the specification will be sufficient to vacate the patent. In a case before Lord *Mansfield*, for infringing a patent for steel trusses, it appeared that the patentee, in tempering the steel, rubbed it with tallow, which was of some use in the operation; and, because this was omitted, the specification was held to be insufficient, and the patent was avoided.

Rule absolute.

This was an action by the indorsee of a bill of exchange against the indorser, tried before *Heath*, Justice, at the last assizes at *Warwick*. The bill, which was dated on the 4th of *November*, 1786, was drawn by one *Lutwych*, on *John Rutter*, in favour of the defendant, and payable sixty-five days after date. The defendant indorsed it to the plaintiffs. The bill was tendered for acceptance by the plaintiffs to *Rutter*, on the 8th of *November*, who refused to accept it. The first advice given of this refusal by the plaintiffs to the defendant was by a letter, dated the 6th of *January* following, which only mentioned generally the return of the bill, without specifying the time or circumstance of the tender of the bill to *Rutter*, and his refusal. The bill expired on the 11th of *January*, and, on the next day, the defendant made a proposal to one of the plain-

Goodall and others against Dolley, E.
27 G. III. B. R.
Durnford and East, 1 V. 712.
If the indorsee of an in and bill, not due, present it for acceptance, which is refused, and delay giving notice to his indorser, the indorser will be discharged. And a subsequent proposal by the indorser, to pay the bill by instalments, made without knowledge of the indorsee's laches, is not a waiver of the want of notice.

tiffs, to pay the bill by instalments. *Heath*, Justice, was of opinion, that as this proposal was made under an ignorance of all the circumstances of the case, which it was material for the defendant to know, he was discharged by the laches of the plaintiffs; and, in consequence of that direction, the jury found a verdict for the defendant.

A motion was made by *Lee* for a new trial, on two grounds. First, that as notice in this case could not have been of any service to the defendant, in as much as *Rutter* was insolvent when the bill was refused acceptance, it was not necessary to give notice before the bill became due, and the indorser still continued liable. Secondly, supposing he might once have taken advantage of the plaintiffs laches, yet he had waived that advantage by his subsequent promise.

Balguy shewed cause. As to the first point, it is perfectly clear that the plaintiffs, if they meant to resort to the defendant, should have given immediate notice to him of the bill's being dishonoured; instead of which, they suffered a long space of time to elapse, by which neglect they have discharged the defendant. As to the other point; the defendant cannot be said to have made himself liable by his subsequent conduct: for, if that were so, the same reasoning would have governed the case of *Blesard* and *Hirst* (a), where there was an *absolute promise* to pay. That, therefore, was much stronger than the present; for here the party did not absolutely say that he would pay the bill; but, under an ignorance of all the circumstances, he proposed to pay it by instalments. This then, at most, was only a *conditional offer*, and, not being accepted,

(a) 5 Burr.
2670.

cepted, was the same as if it never had been made.

Lee and *Dayrell* in support of the rule. The case of *Blesard* and *Hirst* was materially different from the present; for the ground of that decision was, that, if notice had been given, it would have been extremely material, as the drawer continued in credit for three weeks after the bill had been dishonoured. But here it was utterly impossible that notice could have been of any service whatever; for the defendant being the only indorser, could not have resorted to the drawer; for, in truth, he became insolvent immediately after the bill was tendered for acceptance. But supposing the neglect of the plaintiff had at one time discharged the defendant from payment, yet he made himself subsequently liable, by his offer to pay. And no argument can be drawn from the silence of the court in *Blesard* and *Hirst*, for that point was never mentioned even in argument; but if it had been urged, it would have been decisive in favour of the plaintiff.

The plaintiff's counsel also offered to procure an affidavit, that the drawee had no effects of the drawer in his hands at the time. But as to this, the court were of opinion, that, as between these parties, that would make no difference.

ASHHURST, J.—The case of *Blesard v. Hirst* goes the whole length of deciding the present. It was there determined, that though it was not necessary that the holder should present the bill for acceptance before it became due, yet if he does, he must give immediate notice to the person from whom he received the bill, in case it is dishonoured.

Here such notice was not given, and therefore the defendant was discharged. But then it is said, that he made himself subsequently liable, by his proposal to pay the bill by instalments, which amounted to an acknowledgment of the debt. That argument might as well have been urged in the case of *Blesard v. Hirst* as the present, if it had been thought material: for there the indorser *absolutely promised* to pay the bill on his return from *Leeds*; but, on his being apprised that he was not bound by law, he refused; and yet that was not held as a waiver of the want of notice. That, indeed, was a stronger case than the present; for here the defendant only made a *conditional offer* to pay by instalments, which being rejected, put matters in the same situation as if no offer had been made. The defendant then had a right to stand on the strict rule of law, and by law he is not bound to pay.

BULLER, J.—It is rather extraordinary, that in the case of *Blesard v. Hirst*, it should have been made a doubt whether notice of non-acceptance in the case of an inland bill of exchange, was necessary to be given to the drawer: for it had long been settled, that notice was necessary to be given in the case of foreign bills. But no mention is there made of the want of notice being waived by a subsequent promise; and that was a much stronger case than the present: for there there was an *express promise* to pay by the indorser; but, in this case, there was only a *conditional promise*, which was made by the defendant under a total ignorance of all the circumstances relative to the bill having been dishonoured. All this is an answer to an action against the indorser. But if the
action

action had been brought against the drawer, I should have been willing to let in the affidavit, to shew that the drawer had no effects in the hands of the drawee. That would be like the case of *Bickerdike v. Bollman* (a). If

(a) Durnford
and East, 1 V.
405.

A. draw on *B.* it must be taken *prima facie* that he has effects in his hands; otherwise he has no right to draw on him. But if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice that the drawee will not pay.

GROSE, J.—If there be any difference between the case of *Blesard v. Hirst* and the present, it is in favour of this defendant: for, at the most, this was only a *conditional offer* to pay, but that was a *positive promise* by the defendant, to take up the bill as he returned from *Leeds*. That case, therefore, being precisely in point, must govern the present.

Rule discharged.

VI. For Excessive Damages.

Vide ante Essay IV. Wheeler v. Honour.

Wood and Gunston, M. 1655, Banc. sup. Styl. 466. For a new trial in an action of trespass for words. *Vide ante No. IV. Bright v. Ey-non.*

Wood brought an action upon the case against *Gunston*, for speaking of scandalous words of him, and, amongst other words, for calling him TRAYTOR, and obtained a verdict against him at the bar, wherein the jury gave 1500 l. damages. Upon the supposition that the damages were excessive, and that the jury did favour the plaintiff, the defendant moved for a new trial. But Serjeant *Maynard* opposed it, and said, that after a verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books of the law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new trial; but if it were, the damages are not here excessive, if the words spoken be well considered, for they tend to take away the plaintiff's estate and his life. *Windham*, on the other side, pressed for a trial, and said it was a packed business, else there could not have been so great damages; and the court hath power in extraordinary cases, such as this is, to grant a new trial.

Discretion of the court. Discretion judicial, not arbitrary. The court not to be intended partial.

GLYN, Chief Justice. It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary discretion; and it is frequent in our books for the court to take notice of miscarriages

riages of juries, and to grant new trials upon them, and it is for the people's benefit that it should be so: for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them; but it cannot be so intended of the court: *wherefore let there be a new trial the next term, and the defendant shall pay full costs, and judgment to be upon this verdict, to stand for security to pay what shall be recovered upon the next verdict.*

In *Styles*, fo. 462, is the following note in the same cause.

Upon a motion for a new trial between *Wood* and *Gunston*, upon a supposition of excessive damages given by the jury, in an action upon the case, tried at the bar for words, *viz.* calling the plaintiff *traytor*, &c. 1500*l.* being the damage given, it was said by *GLYN*, Chief Justice, that if the court do believe that the jury gave their verdict against their direction, given unto them, the court may grant a new trial. *And a new trial was granted in this case, after a full debate had by counsel on both sides.*

In an action upon the case by an officer of the custom-house at *Portsmouth*, because the defendant said of him, *he set his hand to the petition to bring the king to justice.* After verdict for the plaintiff, a new trial was moved for, on account of excessive damages, which were 700*l.* and *Wood* and *Gunston's* case, *Style's Rep.* was cited. But to this it was answered by *Twisden*, that the new trial in *Wood* and *Gunston's* case, was not granted merely for the excessiveness of the damages, but because tampering with the jury was proved. Q. It was moved that the attorney for the plaintiff said before the trial, that the jury were their friends,

Vide observations upon this case in *Roe v. Hawkes*, post. and in 1 Sid. 131, 132. Mod. 251, and *Beardmore's* case post.

Mich. 1655. Memorandum. New trial for miscarriage of the jury.

Roe v. Hawkes, E. 15 Car. II. B. R. 1 Lev. 97. New trial not granted for excessive damages, nor for words spoken by the successful party's attorney, that the jury were their friends, &c.

Vide ante.

friends, and understood their business, and they would do well enough. But by WINDHAM, J. If express embracery of the jury be not proved, the words of the attorney shall not prejudice the cause of his client, and if the damages are excessive, attain lies, and a new trial was denied.

The Lord
Townshend v.
Dr. Hughes, M.
28 and 29 C. II.
C. B. 2 Mod.
150. No new
trial in an action
of scandalum
magnatum.
Mod. Rep. 232.

The plaintiff brought an action of *scandalum magnatum*, for these words spoken of him by the defendant, *viz. He is an unworthy man, and acts against law and reason*. Upon not guilty pleaded, the case was tried, and the jury gave the plaintiff 4000 l. damages.

The defendant, before the trial, made all possible submission to my lord: he denied the speaking the words, and made oath that he never spoke the same; after the trial he likewise applied to my lord as before, making several protestations of his innocence: but having once in a passion said, that he scorned to submit, my lord, for that reason, would not remit the damages; it was therefore moved for a new trial upon these reasons:

1. Because the witnesses who proved the words, were not persons of credit; and that, at the time when they were alledged to be spoken, many clergymen were in company with the defendant, and heard no such words spoken.

2. It was sworn that one of the jury confessed, that they gave such great damages to the plaintiff (not that he was damaged so much) but that he might have the greater opportunity to shew himself noble in the remitting of them.

3. And which was the principal reason, because the damages were excessive.

The

The court delivered their opinions *seriatim*; Curia and first,

The Chief Justice *North* said: In cases of fines for criminal matters, a man is to be fined by *Magna Charta*, with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay; but, in civil actions, the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof.

This is a civil action, brought by the plaintiff for words spoken of him, which, if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain; but if a particular averment of special damages makes them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen *in futuro*, because for such the plaintiff may have a new action. He said, that, as a judge, he could not tell what value to set upon the honour of the plaintiff; the jury have given 4000*l.* and therefore he could neither lessen the sum, or grant a new trial, especially since by the law, the jury are judges of the damages; and it would be very inconvenient to examine upon what account they gave their verdict, they having found the defendant guilty, did believe the witnesses, and he could not now make a doubt of their credibility.

Wyndham, Justice, accorded *in omnibus*.

Atkins, Justice, *contra*. That a new trial should be granted, for 'tis every day's practice; and he remembered the case of *Gouldston* and *Wood*, in the King's-bench, where the plaintiff, in an action on the case for words, for calling of him *bankrupt*, recovered 1500*l.*

and

Wood and Gouldston. Vide ante.

and that court granted a new trial, because the damages were excessive.

The jury, in this case, ought to have respect only to the damage which the plaintiff sustained, and not to do an unaccountable thing, that he might have an opportunity to shew himself generous; and as the court ought with one eye to look upon the verdict, so with the other they ought to take notice what is contained in the declaration, and then to consider whether the words and damages bear any proportion; if not, then the court ought to lay their hands upon the verdict: 'tis true, they cannot lessen the damages, but if they are too great, the court may grant a new trial.

Scroggs, Justice, accorded with *North* and *Wyndham*, that no new trial can be granted in this cause. He said, that he was of counsel with the plaintiff, before he was called to the bench, and might, therefore, be supposed to give judgment in favour of his former client, being prepossessed in the cause, or else (to shew himself more signally just) might, without considering the matter, give judgment against him: but that now he had forgot all former relation thereunto, and therefore delivered his opinion, that, if he had been of the jury, he should not have given such a verdict; and, if he had been plaintiff, he would not take advantage of it, but would overcome with forgiveness such follies and indiscretions of which the defendant had been guilty; but that he did not fit there to give advice, but to do justice to the people. He did agree that where an unequal trial was, (as such must be where there is any practice with the jury,) in such case 'tis good reason to grant a new trial;

trial; but no such thing appearing to him in this case, a new trial could not be granted.

Suppose the jury had given a scandalous verdict for the plaintiff, as a penny damages, he could not have obtained a new trial, in hopes to increase them; neither shall the defendant, in hopes to lessen them: and therefore, by the opinion of these three justices, a new trial was not granted.

Afterwards in this term, Serjeant *Maynard* moved in arrest of judgment, and said, that this action was grounded upon the statute of *R. II.* which consists of a preamble, reciting the mischief, and of the enacting part, in giving of a remedy; and that the defendant's case was neither within the mischief or the remedy.

This statute doth not create any action by way of particular design; and if the matter was now *res integra*, much might be said that an action for damages will not lie upon this statute; for the statute of *Westm. 2.* appoints that the offender shall suffer imprisonment, until he produces the author of a false report; and the statute of *2 R. II.* which recites that of *Westm. 2.* gives the same punishment, *Ca. 33.* and the action is brought *qui tam, &c.* and yet the plaintiff only recovers for himself. It was usual to punish offenders of this kind in the *Star Chamber*; as in the Earl of *Northampton's* case, where one *Goodricke* said of him, *That he wrote a book against Garnet, and a letter to Bellarmine*; intimating, that what he wrote in the book was not his opinion, but only *ad captandum populum*, which was a great disgrace to him in those days, being as much as to say he was a papist. *Cro. Eliz.* 12 Co. 132.

But

But the Serjeant would not insist upon that now, since it hath been ruled, that where a statute prohibits the doing of a thing, which, if done, might be prejudicial to another, in such case he may have an action upon that very statute for his damages.

But the ground on which he argued was, that these words, as spoken, are not within the meaning of the act, for they are not actionable.

4 Co. 13.

1. Because they are no scandal; and words which are actionable must import a great scandal, which no circumstance or occasion of speaking can excuse; and if they are scandalous, and capable of any mitigation by the precedent discourse, the pleading of that matter will make them not actionable; and for this the Lord *Cromwell's* case is a plain authority. The words spoken of him were, *You like those that maintain sedition against the King's person*; the occasion of speaking of which was, to give an account of his favouring the Puritan preachers, which was all that was intended by the former discourse; for that Lord had approved a sermon which was preached by a parson against the *Common Prayer Book*; and the defendant having forbid such preaching, the Lord told him *that he did not like him*, upon which he spoke those words: so that the subject matter explained the sense, for which reason it was adjudged that the action would not lie.

2. The scandal for which an action may be brought within this statute must be *false*, for that word goes quite through the whole act, viz. *false news, false lies, &c.* and the words here are so general, that it cannot appear whether they are true or false, for there

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can be no justification here, as in case where a man is charged with a particular crime; my Lord *Townshend* is not charged with any particular act of injustice as a subject, nor with any misdemeanor as a peer, nor with any offence in an office.

If, therefore, in all actions brought upon this statute, the defendant may justify, and put the matter in issue, to try whether it be true or false, and in this case the defendant can neither justify nor traverse; for this reason the action will not lie.

That the words are general, and of a doubtful signification, it cannot be denied; for to say, *He is an unworthy man*, imports no particular crime. *Unworthy* is a term of relation, as he is unworthy of my friendship, acquaintance or kindred, and so may be applicable to any thing; and a lord may in many things be unworthy of a particular man's friendship; as if he promises to pay a sum of money at a day certain, and faileth in the payment, (as 'tis often seen,) such is an unworthy man; but that will not bear an action. He is an unworthy man who invites another to dinner to affront him; but it will not bear an action to say, *That a lord invited me to a dinner to abuse me*; neither will it be actionable to say, *He is an unworthy man*, because such instances may be given of his unworthiness, which will not bear an action. If my Lord had been compared to any base and unworthy thing, these words might have been actionable; and that was the case of the Lord Marquis of *Dorchester*, it being said of him, *That there was no more value in him than in a dog*.

Then to say, *a man acts against law*, this is no scandal; because every man who breaks a
penal

penal law, and suffers the penalty, is not guilty of any crime. The statute commands the burying in woollen, the party buries one of his family in linen; in this he acts against the law, but if the penalty is satisfied, the law is so likewise.

A man who acts against law acts against reason, because *Lex est summa ratio*; but no instance is here given wherein he did thus act. 'Tis not said that he did act against law wilfully, or that he used to do any thing against law; and so cannot be like the case of the Duke of *Buckingham*, who brought an action for these words, *viz. You are used to do things against law, and put cattle into a castle, where they cannot be replevied*; for there was not only an usage charged upon him, but a particular instance of oppression.

This action lies for words spoken of a judge of either bench, and of a bishop, as well as a peer. Now if a man should say, *A judge acted against law*, will an action lie? Because a judge may do a thing against law, and yet very justly and honestly, unless all the judges were infallible, and could not be subject to any mistakes, which none will deny.

So if a bishop return the cause of his refusal to admit a clerk *quia criminosus*, this is a return against law, because 'tis too general; but if *J. S.* should say, *a bishop acted against law, and shewed that for cause*, an action would not lie. If the Lord *Townshend* had commanded his bailiff to make a distress without cause, that had been acting against law and reason.

He agreed the words to be uncivil, but not actionable; for if such construction should be made, a man must talk in print, or otherwise
not

not speak any thing of a peer, for fear of an action.

There are many authorities where a peer shall not have an action, for every trivial and slight expression spoken of him.

As to say of a peer, *He keeps none but rogues, and rascals about him, like himself*; by the opinion of two Justices, *Yelverton* and *Fleming*, the action would not lie, because they are words of scolding; and this was the case of the Earl of *Lincoln*, *Cro. Jac.* 196. But the court was divided, the defendant died, and so the writ abated.

Actions for words have been of late too much extended; formerly there were not above two or three brought in many years; and if this statute should be much enlarged, the lords themselves will be prejudiced thereby, by maintaining actions one against another.

Upon this statute of 2 R. II. c. 5. there was no action brought till 13 H. VII. which was above an hundred years after the making of that law; and the occasion of making the law was, because the Duke of *Lancaster*, who was then the first prince of the blood, took notice that divers were so hardy as to speak of him several lying words, 1 R. II. num. 56. and therefore this statute was made to punish those who devised *false news, and horrible and false lies of any peer, &c.* whereby discords might arise between the Lords and Commons, and great peril and mischief to the realm, and quick subversion thereof. Now from the natural intent and construction of these words in the act, can it be supposed that if one should say, *Such a peer is an unworthy man*, that the kingdom would be presently in a flame, and turned into a state of confusion and civil war; and

and to say, *That he acts against law*, that the government would thereby be in danger to be lost, and quick subversion would follow? This cannot be the common and ordinary understanding of these words.

If, therefore, the plaintiff by speaking these words was in no hazard, nor anywise dammed; if he was not touched in his loyalty as a peer, nor in danger of his life as a subject; if he was not thereby subjected to any corporal or pecuniary punishment; nor charged with any breach of oath, nor with a particular miscarriage in any office; if the words are so general that they import no scandal, and are not capable of any justification; and lastly, if they are not such horrible lies as are intended to be punished by the statute; for these reasons he concluded the action would not lie, and therefore prayed that the judgment might be arrested.

Serjeant *Baldwin* and Serjeant *Barrel* argued on the same side for the defendant, but nothing was mentioned by them which is not fully insisted on in the argument of Serjeant *Maynard*, for which reason I have not reported their arguments.

Ex parte quer.

But *Pemberton*, serjeant, who argued for the plaintiff, said, that it would conduce much to the understanding of the statute of 2 R. II. cap. 5. upon which this action of *scandalum magnatum* was grounded, to consider the occasion of the making of it.

In those days the *English* were quite of another nature and genius from what they are at this time; the constitution of this kingdom was then martial and given to arms, the very tenures were military, and so were the services, as knight's service, castle-guard, and escuage.

There

There were many castles of defence in those days in the hands of private men; their sports and pastimes were such as tilts and tournaments, and all their employments were tending to breed them up in chivalry.

Those who had any dependency upon noblemen were inured to bows and arrows, and to signalize themselves in valour it was the only way to riches and honour. Arts and sciences had not got such ground in the kingdom as now; but the commons had almost their dependence upon the lords, whose power then was exceeding great, and their practices were conformable to their power; and this is the true reason why so few actions were formerly brought for scandal, because when a man was injured by words, he carved out his own remedy by his sword.

There are many statutes made against riding privately armed, which men used in those days, to repair themselves of any injury done unto them, for they had immediately recourse to their arms for that purpose, and seldom or never used to bring any actions for damages.

This was their revenge; and having thus made themselves judges in their own cases, it was reasonable that they should do themselves justice with their own weapons; but this revenge did not usually end in private quarrels, they took parties, engaged their friends, their tenants, and servants on their sides, and by such means made great factions in the commonwealth, by reason whereof the whole kingdom was often in a flame, and the government as often in danger of being subverted; so that laws were then made against wearing liveries or badges, and against riding armed.

This was the mischief of those times; to prevent which this statute of *R. II.* was made, and therefore all provoking and vilifying words which were used before to exasperate the peers, and to make them betake themselves to arms, by the intent of this act are clearly forbidden, which was made chiefly to prevent such consequences; for it was to no purpose to make a law, and thereby to give a peer an action for such words as a common person might have before the making of the statute, and for which the peer himself had a remedy also at the common law, and therefore needed not the help of this act.

If then the design of this statute was to hinder such practices as aforesaid, the next thing to be considered is, what was usual in those days to raise the passions of peers to that degree, and that will appear to be, not only such things as imported a great scandal in themselves, or such for which an action lay at the common law, but even such things as favoured of any contempt of their persons; and such as brought them into disgrace with the commons, for hereby they took occasion of provocation and revenge.

'Tis true that very few actions were brought upon this statute in some considerable time after it was made; for though such practices were thereby prohibited, the lords did not presently apply themselves to the remedy therein given, but continued the military way of revenge to which they had been accustomed.

As to the first objection that hath been made, he gave no answer to it, because it was not much insisted upon on the other side, whether an action would lie upon this statute, for the very words of it are sufficient ground for an action;

action; and 'tis very well known that wherever Maxima.
 an act prohibits an evil thing, the person against
 whom such thing is done, may maintain an
 action.

This statute consists of two parts, the first is Vide ante.
 prohibitory, viz. *That no man shall do so, &c.*
 Then comes the additional clause, and faith,
That if he do he shall incur such penalty. 'Tis
 on the first part that this action is grounded;
 and so it was in the earl of *Northampton's case*,
 in that report which goes under the name of
 Lord Coke's 12th report, where by the reso-
 lution of all the judges in *England*, except
Flemming, who was absent, it was adjudged
 that it was not necessary that any particular
 crime should be fixed on the plaintiff, or any
 offence for which he might be indicted.

So are the authorities in all the cases relating
 to this action. In the Lord * *Cromwell's case*, * 4 Co. 13. b.
 for these words, *You like those who maintain* 2 Cro. 196.
sedition. In the Lord of *Lincoln's case*, *My*
lord is a base earl, and a paltry lord, and keepeth
none but rogues and rascals like himself. In the
 Duke of *Buckingham's case*, *He has no more*
conscience than a dog. In the Lord † *Marquis* † Hil. 16 Car. II.
 of *Dorchester's case*, *He is no more to be valued* Rct. 1269.
than the black dog which lies there. All which Affirmed on a
 words were held actionable, and yet they touch writ of error in
 not the persons in any thing concerning the B. R.
 government, or charge them with any crime,
 but in point of dignity or honour; and they
 were all vilifying words, and might give oc-
 casion of revenge.

And so are the words for which this action
 is brought, they are rude, uncivil, and ill-
 natured; *unworthy*, is as much as to say base
 and ignoble, a contemptible person, and a
 man of neither honour or merit. And thus

to speak of a nobleman, is a reflection upon the king, who is the fountain of honour, that gives it to such persons who are (in his judgment) deserving, by which they are made capable of advising him in parliament, and it would be very dishonourable to call unworthy men thither.

'Tis likewise a dishonour to the nobility to have such a person to sit among them as a companion, and to the commons to have their proceedings in parliament transmitted to such peers: so that it tends to the dishonour of all dignities, both of king, lords, and commons, and thereby discords may arise between the two houses, which is the mischief intended to be remedied by this act.

Then the following words are as scandalous; for to say *A man acts against law and reason*, imports several such acts done; a man is not denominated to be unworthy by doing of one single act; for in these words more is implied, than to say *he hath done an unworthy thing*; for the words seem to relate to the office which the plaintiff had in the country, as lord lieutenant, which is an office of great honour; and can any thing tend to cause more discord and disturbance in the kingdom than to say of a great officer, *That he acts according to the dictates of his will and pleasure*? The consequence of which is, that he will be rather scorned than obeyed.

It hath been objected, that the words are general, and charge him not with any act. *Answer.* The scandal is the greater; for 'tis not so bad to say *A man did such a particular thing against law and reason*, as to say, *He acts against law*; which is as much as to say, his constant course and practice is such: and to
say

say that the words might be meant of breaking a penal law, that is a foreign construction; for the plain sense is, he acts against the known laws of the kingdom, and his practice and designs are so to do, for he will be guided neither by law or reason.

Object. It has been objected that the scandal must be false: but whether true or not, there can be no justification here, because they are so general, that they cannot be put in issue.

Ans. He agreed that no action would lie upon this statute if the words were true; but in some cases the divulging of a scandal was an offence at the common law; now to argue (as on the other side) that the defendant cannot justify, and therefore an action will not lie, is a false consequence; because words may be scandalous and derogatory to the dignity of a peer, and yet the subject matter may not be put in issue.

He agreed also that occasional circumstances may extenuate and excuse the words, tho' ill in themselves; but this cannot be applied to the case in question, because the words were not mitigated: the defendant pleaded not guilty, and insisted on his innocence; the jury have found him guilty, which is an aggravation of his crime; if he would have extenuated them by any occasion upon which they were spoken, he should have pleaded it specially, or offered it in evidence, neither of which was done.

This act is to be taken favourably for him against whom the words are spoken; because 'tis to prevent great mischiefs which may fall out in the kingdom, by rude and uncivil discourses; and in such cases 'tis usual for courts rather to enlarge the remedy than to admit of

any extenuation; for which reasons he prayed that the plaintiff might have his judgment.

It was argued by Serjeant *Caltbrop* on the same side, and to the same effect.

Argument at the
Bench.

Afterwards this term, all the judges argued this case, *seriatim* at the bench. And first, Justice *Scroggs* said, That the greatness of the damages given should not prevail with him, either on the one side or the other; at the common law no action would lie for such words, though spoken of a peer, for such actions were not formerly much countenanced; but now since a remedy is given by the statute, words should not be construed either in a rigid or mild sense, but according to the genuine and natural meaning, and agreeable to the common understanding of all men.

At the bar the strained sense for the plaintiff is, that these words import *He is no man of honour*; and for the defendant that they import *no scandal*, and that no more was meant by them, but what may be said of every man.

'Tis true, in respect of God Almighty, we are all unworthy, but the subsequent clause explains what unworthiness the defendant intended, for he infers him to be *unworthy, because he acts against law and reason*.

Now whether the words thus explained fix any crime on the plaintiff, is next to be considered, and he was of opinion that they did fix a crime upon him; for to say *He is an unworthy man*, is as much as to say, *He is a vitious person*, and is the same as to call him *a corrupt man*, which in the case of a peer is actionable; for general words are sufficient to support such an action, though not for a common person.

To

To say a man acts against law and reason, is no crime, if he does it ignorantly; and therefore if he had said *My lord is a weak man, for he acts against law and reason*; such words had not been actionable; but these words as spoken do not relate to his understanding, but to his morals; they relate to him also as a peer (though the contrary has been objected) that they relate to him only as a man, which is too nice a distinction; for to distinguish between a man and his peerage, is like the distinction between the person of the king and his authority, which hath been often exploded; the words affect him in all qualities and all relations.

It has been also objected, that the words are too general, and like the case of the bishops return; that a man is *criminosus*, which is not good: but though they are general in the case of a peer, they are actionable; for to say of a bishop *that he is a wicked man*, these are as general words, and yet an action will lie.

It has been also objected, that general words cannot be justified; but he was of another opinion, as if the plaintiff, who was lord lieutenant of the county, had laid an unequal charge upon a man, who upon complaint made to him, ordered such charge to stand, and that his will in such case should be a law. If the person should thereupon say *that the lord had done unworthily, and both against law and reason*, those words might have been justified, by shewing the special matter, either in pleading or evidence.

'Tis too late now to examine whether an action will lie upon this statute, that must be taken for granted, and therefore was not much insisted on by those who argued for the defendant; for the authorities are very plain, that

such actions have been allowed upon this statute.

The words as here laid to be spoken, are not so bad as the defendant might speak, but they are so bad that an action will lie for them; and though they are general, yet many cases might be put of general words which import a crime, and were adjudged actionable.

The Earl of *Leicester's* case, *He is an oppressor*: the Lord of *Winchester's* case, *He kept me in prison till I gave him a release*: these words were held actionable, because the plain inference from them is, *That they were oppressors*: the Lord *Abergavenny's* case, *He sent for me, and put me into little ease*: it might be presumed, that that lord was a justice of peace, as most peers are in their counties, and that what he did was by colour of his authority; so are all the cases cited by those who argued for the plaintiff, in some of which the words were strained to import a crime, and yet adjudged actionable; especially in the case of the Lord Marquis of *Dorchester*, *He is to be valued no more than a dog*; which are less slanderous words than those at the bar, because the slander is more direct and positive.

It appears by all these cases, that the judges have always construed in favour of these actions; and this has been done in all probability to prevent those dangers that otherwise might ensue if the lords should take revenge themselves; for which reasons he held the action would lie.

Atkyns, Justice, contra. This is not a common action upon the case, but an action founded upon the statute of 2 R. II. upon the construction whereof the resolution of this case will

will depend, whether the action will lie or not. And as to that he considered,

1. The occasion.
 2. The scope.
 3. The parts of the statute.
1. The occasion of it is mentioned in *Cotton's Abridgment of the Records of the Tower*, f. 173. nu. 9 and 10. At the summoning of this parliament, the bishop of *St. David's* declared the causes of their meeting, and told both the houses of the mischiefs that had happened by divers slanderous persons, and sowers of discord, which he said were dogs that eat raw flesh; the meaning of which was, that they devoured and eat one another; to prevent which the bishop desired a remedy, and his request seemed to be the occasion of making this law; for *ex malis moribus bonæ nascuntur leges*.

2. The scope of the act was to restrain unruly tongues from raising *false reports, and telling stories and lies of the peers and great officers of the kingdom*; so that the design of the act was to prevent those imminent dangers which might arise, and be occasioned by such false slanders.

3. Then the parts of the act are three, *viz.* reciting the offence and the mischief, then mentioning the ill effects, and appointing of a penalty.

From whence he observed,

1. That here was no new offence made or declared; for nothing was prohibited by this statute, but what was so at the common law before.

The offences to be punished by this act, are *mala in se*, and those are offences against the moral law; they must be such in their nature,

ture, as bearing of false witness; and these are offences against a common person, which he admitted to be aggravated by the eminency of the person against whom they were spoken; but every uncivil word, or rude expression spoken, even of a great man, will not bear an action; and therefore an action will not lie upon this statute for every false lye, but it must be horrible as well as false, and such as were punishable in the high commission court, which were enormous crimes, 12 Co. 43.

By this description of offences, and the consequences and effects thereof, he said he could better judge whether the words were actionable or not; and he was of opinion, that the statute did not extend to words of a small and trivial nature, nor to all words which were actionable, but only to such which were of a greater magnitude, such by which discord might arise between the lords and commons, to the great peril of the realm, and such which were great slanders, and horrible lies, which are words purposely put into this statute, for the aggravation and distinction of the crime; and therefore such words which are actionable at the common law, may not be so within this statute, because not horrible great scandals.

He did not deny but that these were indecent and uncivil words, and very ill applied to that honourable person of whom they were spoken, but nobody could think that they were horrible great slanders, or that any debate might arise between the lords and commons, by reason such words were spoken of this peer, or that it should tend to the great peril of the kingdom, and the quick destruction thereof: such as these were not likely to be the effects and consequences of these words, and therefore coul

could not be within the meaning of the act, because they do not agree with the description given in it.

2. Here is no new punishment inflicted on the offender, for at the common law any person for such offences as herein are described might have been fined and imprisoned, either upon indictment or information brought against him, and no other punishment is given here but imprisonment.

Even at the common law scandal of a peer might be punished by pillory and loss of ears, 5 Co. 125, *de libellis famosis*, 12 Co. 37. 9 Co. 59. *Lamb's case*. So that it appears this was an offence at the common law, but aggravated now, because against an act of parliament, which is a positive law; much like a proclamation which is set forth to enforce the execution of a law, by which the offence is afterwards greater.

He did agree, that an action would lie upon this statute, though there were no express words to give it to a peer, because where there is a prohibition and a wrong and damage arises to the party, by doing the thing prohibited; in such case the common law doth intitle the party to an action, 10 Co. 75. 12 Co. 100, 103. And such was the resolution in the Earl of *Northampton's case*, upon construction of the law as incident to the statute, and as the offence is greater because of the act, and as the action will lie upon the statute, so the party injured may sue in a *qui tam*, which he could not have done before the making this law.

3. But that such words as these were not actionable at the common law, much less by the statute; for the defendant spoke only his judgment and opinion, and doth not directly charge

charge the plaintiff with any thing, and might well be resembled to such cases as are in *Roll's Abridgm.* 1 part 57 pl. 30. which is a little more solemn, because adjudged upon a special verdict; the words were spoken of a justice of peace, *Thou art a blood sucker, and not fit to live in a commonwealth.* These were not held actionable, because they neither relate to his office, or fix any crime upon him. *Fol.* 43, in the same book, *Thou deservest to be hanged,* not actionable, because it was only his opinion.

So, where the words are general, without any particular circumstances, they make no impression and gain no credit; and therefore in *Cro. Car.* 111. 1 *Roll. Abridgm.* 107. pl. 43. *You are no true subject to the king;* the action would not lie.

In this case 'tis said, the plaintiff acts against law, which doth not imply a habit in him so to do; and when words may as well be taken in a mild, as in a severe sense, the rule is *quod in mitiori sensu accipienda sunt.* Now these words are capable of such a favourable construction; for no more was said of the plaintiff, than what in some sense may be said of every person whomsoever; for who can boast of his innocence? Who keeps close in all actions to law and reason? And to say *a man acts against both,* may imply that he departed from those rules in some particular cases, where it was the error of his judgment only.

In the Duke of Buckingham's case, *Sheppard's Abridgment*, 1 part. f. 28. viz. *You are used to do things against law;* and mentions a particular fact there indeed, because of *usage* of the ill practice, it was held that an action lies; but if he had been charged for doing a thing against law but once, an action would not lie.

He

He then observed how the cases which have been adjudged upon this statute, agree with the rules he had insisted on in his argument, which cases have not been many, and those too of late times; in respect of the antiquity of the act; which was made almost 300 years since, *anno* 1379. And for 120 years after no action was brought: the first that is reported was 13 *H. VII. Keilway* 26. So that we have no *contemporanea expositio* of the statute to guide an opinion, which would be a great help in this case, because they who make an act, best understand the meaning; but now the meaning must be collected from the statute itself, which is the best exposition, as the rule is given in *Bonham's case*, 8 *Co. vide* the case, in 13 *H. 7.*

The next case in time is the Duke of *Buckingham's case*, 4 *H. 8. Crompt. Jur. of Courts*, f. 13. *You have no more conscience than a dog. Lord Abergavenny against Cartwright*, in the same book, *You care not how you come by goods*; in both which cases the words charge the plaintiff with particular matter, and give a narrative of something of a false story, and do not barely rest upon an opinion. In the Bishop of *Norwich his case*, *Cro. Eliz. 1. viz. You have writ to me that which is against the word of God, and to the maintenance of superstition.* These were held actionable, because they refer to his function and greatly defame him, and yet he had but 530 marks damages. 29 and 30 *Eliz. 1 Cro. 67. The Lord Mordant against Bridges, My Lord Mordant did know that Prude robbed Shotbolt; and bid me compound with Shotbolt for the same; and said he would see me satisfied for the same, though it cost him an hundred pounds; which I did for him, being my master, otherwise*

the evidence I could have given would have banged Prude. These words were held actionable, and 1000 l. damages given; and in all the other cases which have been mentioned upon this statute, and where judgment was given for the plaintiff, the words always charge him with some particular fact, and are positive and certain; but where they are doubtful and general, and signify only the opinion of the defendant, they are not actionable.

The words in the case at bar, neither relate to the plaintiff as a peer, or a lord lieutenant; and charge him with no particular crime; so that from the authority of all these cases he grounded his opinion, that the action would not lie; and he said, if laws should be expounded to wrack people for words, instead remedying one mischief, many would be introduced, for in such case they would be made snares for men.

The law doth bear with the infirmities of men; as religion, honour, and virtue doth in other cases; and amongst all the excellent qualities which adorn the nobility of this nation, none doth so much as forgiving of injuries; *Solomon saith, That 'tis the honour of a man to pass by an infirmity.* Which if the plaintiff should refuse, yet the defendant (if he thinks the damages excessive) is not without his remedy by attain, for he said he could shew where an attain was brought against a jury for giving 60 l. damages.

He farther said, that he could not find that any judgment had been either reversed or arrested upon this statute, and therefore it was fit that the law should be settled by some rule, because 'tis a wretched condition for people to live under such circumstances, as not to

know

know how to demean themselves towards a peer; and since no limits have been hitherto prescribed, 'tis fit there should be some now, and that the court should go by the same rules in the case of a peer, as in that of a common person, that is, not to construe the words actionable without some particular crime charged upon the plaintiff, or unless he alledge special damages; for which reasons he held that this action would not lie.

Wyndham, Justice, accorded with *Scroggs*, and the Chief Justice *North* agreed with them in the same opinion; his argument was, *viz.*

First, he said that he did not wonder that the defendant made his case so solemn, being loaded with so great damages; but that his opinion should not be guided with that or with any rules, but those of law, because this did not concern the plaintiff alone, but was the case of all the nobility of *England*; but let it be never so general, and the conveniences or inconveniences never so great, he would not upon any such considerations alter the law.

He said that no action would lie upon this statute, which would not lie at the common law; for where a statute prohibits a thing generally, and no particular man is concerned, an offence against such a law is punishable by indictment; but where there is a particular damage to any person by doing the thing prohibited, there an action will lie upon the statute; and so it will at the common law.

The words therefore which are actionable upon this statute are so at the common law.

This statute extends only to peers or other great officers; now every peer, as such, is a great officer, he has an office of great dignity, he is to support the king by his advice, of which
he

he is made capable by the great eminency of his reputation, and therefore all words which reflect upon him as he is the king's counsellor, or as he is a man of honour and dignity, are actionable at the common law.

In the ordinary cases of officers, 'tis not necessary to say that the words were spoken relating to his office, as to say of a lawyer that *he is a sot or an ignoramus*; or of a tradesman, *he is a bankrupt*; the action lies, though the words were not spoken of either as a lawyer or a tradesman.

Quarry?

He did not think that judges were to teach men by what rules to walk, other than what did relate to the particular matter before them; all other things are *gratis dicta*; neither would he allow that distinction, that an action would not lie where a man spoke only his opinion; for if that should be admitted, it would be very easy to scandalize any man, as *I think such a judge is corrupt*, or *I am of opinion that such a privy counsellor is a traitor*; and can any man doubt whether these or such like words are actionable or not, because spoken only as the sense of the person? 'Tis true, in some cases where a man speaks his own particular disesteem, an action will not lie, as if I say, *I care not for such a lord*, but that differs much where a man speaks his opinion with reference to a crime; for opinions will be spread, and will have an implicit faith, and because one man believes it another will; and 'tis upon this ground that all the cases which have been since the statute are justified; and so was the late case of the Marquis of * *Dorchester*, *He is no more to be valued than the black dog which lies there*; which were words of disesteem, and only the opinion

* Sid. 233.

opinion of the defendant, in which case judgment was affirmed in a writ of error.

Object. If it be objected to what purpose this statute was made if no action lies upon it, but what lay at the common law?

Ans. The plaintiff now upon the statute must prosecute *tam pro domino rege quam pro seipso*, which he could not do at the common law. And it has been held in the *Star Chamber*, that if *Scandalum Magnatum* be brought upon this statute, the defendant cannot justify, because 'tis brought *qui tam*, &c. and the King is concerned; but the defendant may explain the words, and tell the occasion of speaking of them; if they are true, they must not be published, because the statute was to prevent discords.

Object. These words carry in them no disesteem.

Ans. According to common understanding, they are words of disrespect and great disesteem; for 'tis as much as to say, that the plaintiff is a man of no honour; he is one who lives after his own will, and so is not fit to be employed under the King. If any precedent discourse had qualified the speaking these words, it ought to have been shewn by the defendant, which is not done; and therefore he concluded that the words, notwithstanding what was objected, were actionable: and so by the opinion of him, *Wyndham* and *Scroggs*, Justices, judgment was given for the plaintiff.

Atkins, Justice, of a contrary opinion.

Assault, battery, and false imprisonment. The Lady *Ash* pretended that her daughter, the plaintiff, was troubled in mind, and brought an apothecary to give her physic, and they

Anne Ash v.
Lady Ash,
8 W. III. B. R.
Comb. 357.
False imprisonment; verdict
for plaintiff with

2000l. damages.
New trial, the
jury refusing to
assign the reason
why they gave
such a verdict.

New trial for ex-
cessive damages.

N. B. The jury
refused to give
the reason of
their verdict.

Vide post.

Juries duty.

Quære.

Evidence.

Prince v. Moul-
ton, T. 9 W. III.
B.R. Comb. 442.

Judgment ar-
rested, because
more damages
given than
ought; i. e. for
a longer space of
time than the
plaintiff actually
lost, or could
lose the use of
his lands, ac-
cording to his
own shewing.

bound her, and would have compelled her to
take physie. She was confined but about two
or three hours, and the jury gave her 2000 l.
damages.

Sir BARTH. SHOWER moved for a new trial
for the excessiveness of the damages.

HOLT, *Ch. J.*—The jury were very shy of
giving a reason for their verdict, thinking
they have an absolute despotic power; but I
did rectify that mistake: for the jury are to
try causes with the assistance of the judges,
and ought to give reasons when required, that,
if they go upon any mistake, they may be set
right; and a new trial was granted.

Nota. ROOKBY, *J.* said *obiter*, that he had
known some things given in evidence under
the words *al' enormia*, which were *turpia*, and
not fit to be mentioned in a declaration.

The plaintiff declares, that 2 *Julius, sexto*
regni regis, he was possessed of a close called
the *Meadow*, and of another close called the
Pingle; and that the defendant, 3 *Augusti*,
anno sexto præd. a certain water-mill did erect,
and the foundations thereof *ulterius solito* did
extend; by reason whereof the plaintiff lost
the use and profit of his said closes, from the
said 2d of *July, sexto*.

The defendant pleaded not guilty, and a
verdict was given at the assizes at *Chester* for
the plaintiff, and entire damages assessed: and
now it was moved in arrest of judgment, that
the jury were inveigled to give damages from
the 2d of *July*, which was before the mill was
built: the jury, indeed, might have helped it
in their verdict, but now it is too late. *Hob.*
189. *Harbin and Green, Mo. 887. S. C.*

NORTHY, *Contra.* One may lose the whole
year's profits by an overflowing in harvest time.

Pasch.

Pasch. 4 Regni Regis, Horner v. Bridges, trespass *tali die*, with a CONTINUANDO from a day which was before, yet held good: so in an action for words spoken at several times, if the words spoken at one of the times were not actionable, but only in aggravation; if entire damages given, they shall be intended only for what is actionable. [*Sed qu.?*] So *Roll. 577. (5.) Gosse and Pangnel*, about as-signing over his trade.

Ward ad idem, cited *Allen 22. Syms and Gregory, Hob. 282. Hunt and Lawring.*

Cheshire ad idem, That if the plaintiff could lose the use and profits of his lands from the 2d of July, then damages are well given; if not, then the jury could not consider it.

Sir Barth. Shower pro defendente. As to the case, *Roll. 577.* the forbearing to exercise his trade was held a good consideration; *con-* Continuando. *tinuando's*, indeed, are rejected, when impossible or inconsistent, because the defendant is not bound to answer the *continuando*. The case of *Syms and Gregory* is answered by that of *Hambleton and Veer, 2 Saund. 169.* If a man brings an action in *Michaelmas* term for words spoken in *November*, it might be said there to be impossible, and helped by intendment, but always held ill.

HOLT, Ch. J.—Where the day is not material, as in trespass, &c. if you lay a day in the declaration, which is really after the action brought, and before the trial, the Judge of *Nisi Prius* will suffer you to give in evidence any day before the action brought; but the defendant may take advantage of it in arrest of judgment; but if you lay a day which is impossible, as the 30th of *February*, or a day which is not come at the time of the trial,

there you may likewise give in evidence any day before the action brought, and there the defendant shall never take advantage of it in arrest of judgment; because the court will intend, that the plaintiff must have given in evidence a time before the trial, else he could not have had a verdict, and the fault in the declaration is cured by the verdict.

In the principal case, it is true, the plaintiff might lose the profits of the whole year by an overflowing in harvest-time; but here is the word *usum*, which is impossible; and yet the jury might compute according to the declaration. I cannot distinguish it from the case of *Harbin and Green*, *Hob.* 189. *Judicium arrestetur*.

Vide 2 Mod.
354.

Clerk v. Udall,
M. 1 Ann. B. R.
Salk. 649.

New trial for
excessive da-
mages, and the
same damages
given, and third
trial refused.
See 6 Mod. 22,
242.

Upon a trial at *nisi prius*, the jury gave excessive damages; and for this cause a new trial was granted. The second jury gave the same damages again, and a second new trial was moved for and denied, because there ought to be an end of things: but several cases were cited, which the Chief Justice allowed, that where, upon the second trial, the jury have doubled the damages, a third trial had been granted.

Anonymous, M.
7 Geo. II.
Barnes, 436.
Action for a
malicious pro-
secution; verdict
for plaintiff;
the judge certi-
fied the damages
to be excessive,
but the court of
different opini-
on, and refused
a new trial.

Chambers v.
Robinson, H.
12 Geo. II.
1 Stra. 691.

This cause was tried the last *Gloucester* assizes. Defendant moved for a new trial; and Mr. Justice *Page* certified the damages (which were 50 l.) to be excessive; but the action appearing to be brought for a very malicious prosecution, and plaintiff having been imprisoned and tried for felony, the court were of opinion, that, in the nature of the thing, the damages appeared to be moderate, and therefore refused to grant a new trial.

In an action for a malicious prosecution of an indictment for *perjury*, the Chief Justice allowed

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allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding the indictment, with other scandalous matter, though an information had been granted for it as a libel, not, as he said, that the jury were to consider it in damages, but only as a circumstance of malice.

Upon the trial it appeared, the perjury was ill assigned; so that the now plaintiff could not have been convicted; and that exception was taken to it by the Judge, and he was acquitted without examination of any witnesses.

But the Chief Justice held the action lay, though it was a faulty indictment, relying upon the case of *Jones v. Gwynn*, where the distinction in *Salk. 13.* was denied, and held by the whole court that the action would lie, though the indictment was bad; a bad indictment serving all the purposes of malice, by putting the party to expence, and exposing him; but it serves no purpose of justice in bringing the party to punishment if he be guilty.

Action lies for malicious prosecution of a bad indictment.

Vide *Jones v. Gwynn. Gilbert's Cases, Oct. 185.*

Salk. 15.

Whereupon the jury gave the plaintiff 100*l.* damages; and the next term the defendant moved the court for their judgment upon this point (which was saved at *nisi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the case of *Jones v. Gwynn*, and the defendant's counsel did not seem to think the reason and authority of that case was to be shaken.

New trial granted for excessive damages, but the same damages being given a second time, another trial cannot be had.

Then the defendant moved for a new trial, on account of the excessiveness of the damages; and the court said it was but reasonable he should

* This said to be a bad reason, and the case denied to be law in Beardmore's case. Vide post.

Vide ante.

Wilford v Berkley, T. 31 G. II. B. R. 1 Burr. 609. Action for crim con. Verdict for plaintiff; 500l. damages; defendant only a clerk in an office with a salary of 50l. per ann. yet new trial refused.

* Mr. Justice Foster was absent.

try another jury *, before he was finally charged with 1000l. So a new trial was granted, upon payment of costs. And a new trial being had, the same damages were given again; upon which the defendant applied to the court, who said it was not in their power to grant a third trial; and so is *Salk.* 649. the case of *Clark v. Udall.*

Mr. *Morton*, on behalf of the defendant, moved for a *new trial* for EXCESSIVENESS of damages. It was an action for CRIMINAL CONVERSATION with the plaintiff's wife: and the jury (a special one) had given 500l. damages. The defendant was a clerk in the Exchequer, during pleasure, at a salary of 50l. a year only, which was his *whole subsistence.*

The court were, all * three, clear and unanimous, that although there was no doubt of the power of the court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, *in cases where* the quantum of the damage really suffered by the plaintiff could be *apparent*, or were of such a nature that the court could *properly judge of the degree* of the injury, and could *see manifestly* that the jury had been outrageous in giving such damages as greatly exceeded the injury; yet the case was very different, where it depended *upon circumstances which were* PROPERLY and SOLELY *under the cognizance of the jury*, and were FIT to be submitted to *their* decision and estimate. And they held the case of criminal conversation with another man's wife to be of this *latter* kind: for the injury suffered by the husband, and the estimate of the damages to be assessed, must, in their nature, depend entirely upon CIRCUMSTANCES, which it was strictly and properly the province of the jury

to judge of; and, in the present case, the court could not say that 500*l.* was too much, or that 50*l.* would have been too little.

Note.—The case of *Chem. v. Brigg, M.* 6 *G. I. B. R.* before Lord Ch. J. *Pratt*, was exactly similar to this; and the very same sum of 500*l.* was given: and the like motion was rejected then, upon the same principles as the court have now rejected the present one.

Motion denied.

Lord MANSFIELD reported the evidence given upon a writ of enquiry, which had been executed before him, and upon which 150*l.* damages had been given.

It was an action brought against the defendant, who was colonel of the *Middlesex* militia, for ordering the plaintiff, who was a common man therein, and had a furlough from the major, to be stripped, and to receive twenty lashes from two drummers.

Mr. *Morton* had moved to set aside this verdict, for EXCESSIVENESS of damages; and had obtained a rule to shew cause. The counsel on both sides left it upon his Lordship's report.

Lord MANSFIELD said, He had no doubt but that it might be right to give an opportunity of reconsidering verdicts, where excessive damages had been given.

But in the present case, he was not dissatisfied with the verdict; for Sir *Thomas* had manifestly acted arbitrarily, unjustifiably, and unreasonably. He had ordered this innocent man to be flogged, (though unjustly and improperly,) merely out of spite to his major; because the major (*Spinnage*) who gave the man the furlough, had offended him: in which he acted *malo animo*, and out of mere

Benson v. Sir Thomas Frederick, Bart.
H. 6 Geo. III.
B. R. 3 Burr.
1845.

Action by a common soldier against his colonel, for an assault, viz. twenty lashes, by two drummers; judgment per default; on inquiry 150*l.* damages; motion to set aside inquiry refused.

spite and revenge. And the man, though not much hurt indeed, was scandalized and disgraced by such a punishment. The defendant is a man of such substance, as to be very able and sufficient to pay this sum; and could only save a part of it by having a new writ of inquiry, if we were to direct one. His Lordship acknowledged, that he thought the damages were very great, and beyond the proportion of what the man had suffered: and yet, under the whole circumstances of the case, he was not for granting a new trial.

Mr. *Justice* WILMOT concurred; and observed, that it was rather owing to the lenity of the drummers than of the colonel, that the man did not suffer *more*.

Therefore, though he had no doubt but that the court might look upon these damages to be too high, in a common and ordinary case, and had power to set aside the verdict, and award a new writ of inquiry; yet, as in *this* case, the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the court were obliged to set aside the verdict that the jury had found.

Mr. *Justice* ASTON concurred. He was very full in vindicating the discretion of the court to grant new trials, even when damages were ideal; and cited the case of * *Wood v. Gunston*. But as in the present case, the defendant had acted very arbitrarily and unjustifiably, and under the circumstances that appeared upon the report, he did not think *this* to be a proper occasion for the court to set the verdict aside.

Per Cur. unanimously, rule discharged.

On

* Vide ante.

On Thursday last, Sir Fletcher Norton, on Monday 24th
behalf of the defendant, moved for a new trial, Nov. 1766.
and to set aside the verdict, which had been Farmer v. Sir
given for the plaintiff, in an action for a ma- Robert Darling,
licious prosecution, with 250 l. damages, at M. 7 Geo. III.
the Middlesex sittings at *nisi prius*, before Lord E. R. 4 Burr.
Mansfield, on the 15th instant. 1971.

His objections were, 1st, That the damages Malicious prosecution by two
were *excessive*; 2dly, That the verdict was indictments for
against evidence. nuisances; ver-
dict for plaintiff;
250 l. damages;
motion for new
trial; 1. for ex-
cessive damages;
2. as a verdict
against evidence,
i. e. want of proof
of probable
cause; new trial
refused.

He had a rule to shew cause.

Lord MANSFIELD now reported the evi-
dence.

It was an action for a *malicious prosecution*
of the plaintiff, by two indictments for nui-
sances; one by a drain, the other by his poul-
terer's yard, both of them near the prosecu-
tor's house: upon which indictments the then
defendant and now plaintiff had been ac-
quitted.

It appeared upon the report, " That there
" was malice implied:" and it appeared that
the plaintiff had actually and *bonâ fide* paid
140 l. in defending himself against the two
indictments.

His LORDSHIP said, he told the jury, that
the foundation of this action was MALICE;
which must be either *express*, or *implied*: and
he acquainted them, that they were *not* obliged
to give *all* the 140 l. expended; or they *might*
(on the other hand) give *more*, if they should
see it proper to do so; he said, he left it to
the jury to consider of the implied malice,
from the groundlessness of the prosecution.

Sir Fletcher Norton, Mr. Morton, and Mr.
Recorder Eyre, now argued on behalf of the
defendant, for a new trial.

They

They said, there was *another* requisite to the maintenance of this sort of action, *BESIDES malice*: it was *also* necessary to prove "that the indictment was *causeless*, and *without any foundation*:" both these are *essential*, and necessary to be proved.

As in a writ of conspiracy, *falsity* is necessary to be charged; so in this case, *malice ALONE* is not sufficient; it must also be a prosecution *without any foundation*. These are two *independent* essentials to the maintenance of this action: there must be both malice and *FALSITY*.

We admit there was *some* evidence of *malice*; but it was proved, by sufficient evidence, *to be a NUISANCE*: therefore there was a *probable cause* for the indictments; and if there was, then the prosecutor is not liable to this action for a malicious prosecution, whatever motive might induce the prosecutor to indict the person guilty of the offence. It would be of dangerous consequence to make a prosecutor liable to this action, where there is a *probable cause* for indicting an offender.

Secondly, The damages are *excessive*; and the court may grant a new trial in matters of *tort*.

The bill of 140*l*. was greatly *overcharged* in many articles. It ought to have been proved to have been *properly* paid, as well as *bonâ fide*. But this bill is not so: for *some* articles in it, there were no vouchers; and some of them are too general; as, for instance, "fundry expences, fourteen guineas."

The counsel for the defendant alledged, that seventeen witnesses proved, "that the nuisance *existed*:" one of whom was the foreman of the grand jury. And they also alledged,

alleged, that it was fully proved, " that Sir
 " *Robert Darling did think, and had good rea-*
 " *son to think, that it was a nuisance.*"

Besides, *Farmer* himself was the occasion of
 it's running to so great expence: for the in-
 dictments were found at *Hicks's-hall*, and he
 removed them hither by *certiorari*; it was he
 also that moved for a *view*: to which Sir
Robert Darling consented, when he needed not
 to have done so. The defendant in the pro-
 secution could not suffer any more damages
 than *the money out of pocket*. There could be
 no injury but to his *property*; there was none
 to his *fame*. He could be intitled to no com-
 pensation for any thing *else* but pecuniary da-
 mages; and the jury could take nothing fur-
 ther into their consideration, as the measure of
 the damages they were to give. 1 *Salk.* 13.
Savil v. Roberts.

Mr. *Stowe* and Mr. *Wallace contra*, for the
 plaintiff, denied the damages to be excessive
 at all, much less against a man of great for-
 tune; which a sheriff of *London*, they said,
 must be supposed to be, at least as far as
 15,000*l.* for otherwise, he might have been
 excused from serving the office by swearing
 himself off. This prosecution of the indict-
 ments was at the peril of the defendant's trade,
 which would have been destroyed, if the pro-
 secution had succeeded.

Upon the *whole* evidence, we proved, and
 the jury believed, that the indictments were
groundless, as well as malicious.

In such an action as this is, the court can-
 not measure the damages by any certain rule:
 they have none to go by. The articles in the
 bill of costs were all of them necessary ex-
 pences to the plaintiff, in order to defend him-
 self

self against these indictments, and were ready to have been proved, if objected to at the trial: and the whole was proved to have been *bonâ fide paid*. And he had reason to remove them from a court where the prosecutor would have been upon the bench.

The distress and vexation, and all the inconveniencies the plaintiff was put to, may fairly be taken into the consideration of his damages, as well as the pecuniary expences.

LORD MANSFIELD.—This action is for a malicious prosecution, without a probable cause.

I cannot say that the jury have done wrong here, in finding that the indictments were preferred without probable cause.

This drain was an ancient drain. The fault arose above and below *Farmer's* part of it. His brick-drain was cleaned and clear. The gift of the indictment was, that he did not "lower his drain:" he had no need to do it.

The verdict was not, in my opinion, against evidence.

The next prosecution was for the feeding the fowls. And I cannot say that the jury had no reason to find this likewise to be an indictment without probable cause.

Every stench is not a nuisance; nor is every noisome trade a nuisance in *every place*; though many of them are nuisances by reason of their *locality*. This was an ancient trade, long carried on in this place; long before Sir *Robert Darling* came there. He comes and builds a house near it, in a place that was formerly a poultry-yard. Nobody before complained of it, or presented it. So that the conclusion does not follow, "that it was a nuisance." And the jury had a *view*; therefore I cannot say, that

that the jury had no reason to take the prosecution to be groundless.

As to the excessiveness of the damages—it does not appear by the verdict, how far the jury gave it upon the *bill*; and how far, upon the whole *circumstances* of the case taken together.

The end and tendency of these two indictments was to drive this plaintiff from his business of a poulterer, after having long carried it on. This was sworn to be the prosecutor's view in preferring them. And they might affect the man's *credit*.

There are many circumstances which make it reasonable, not to indulge the present defendant in sending it to a new litigation, only to abate the *quantum* of the damages, when he has been so much in the wrong.

Therefore he was against granting a new trial.

The THREE other JUDGES entirely agreed with his lordship in both points; and expressed their sentiments at large to the same effect. They likewise agreed with Sir *Fletcher Norton*, as to the grounds of this sort of action; viz. "That *malice*, (either express or implied,) and the *want of probable cause* must both concur." But they were clearly of opinion, that it appeared upon the whole state of the evidence, that in this case they *did* both concur. Therefore they thought the rule ought to be discharged; both objections being sufficiently answered.

Per cur. unanimously.

Rule discharged.

TRESPASS, assault, and imprisonment, to the plaintiff's damage of 300 l. The defendant pleaded the general issue; upon the trial the jury gave a verdict for the plaintiff, and

Leeman v. Allen
and others. E.
3 Geo. III. B.R.
2 Wils. 160.
Imprisonment
for a few hours,
300 l.

300l. damages
not excessive,
and new trial re-
fused.

Verdict not set
aside for a vari-
ance between the
issue delivered
and the record of
nisi prius after a
defence.

300l. damages. In the paper book of the issue, delivered to the defendant with notice of trial, the damages (by mistake) were laid only 200l. but the record of *nisi prius* was right, and agreeable to the roll, which was 300l. damages; after a defence made at the trial, it was now moved by Serjeant *Nares* for the defendants to set aside the verdict upon two matters: 1st, because there is a variance between the issue book delivered and the *nisi prius* record; and 2nd, because the damages are excessive.

It appeared in evidence at the trial, that the plaintiff kept the *Rummer* tavern, in *Chancery-lane*; that the defendants are persons called reforming constables, and under pretence of a warrant from one *Kynaston*, a justice of peace, entered the plaintiff's house with slaves, there seized and carried her into the yard, and said, "*now we have got her, and will carry the bitch to New Prison*;" the defendants would not say what crime she was guilty of, or charged with; *Allen*, the constable, had a warrant, but he did not shew it; that the next morning the plaintiff went to Mr. *Kynaston*'s house, but he was not at home; then she went to Justice *Cox*'s, and again to Mr. *Kynaston*'s, but none of the defendants appeared to prosecute her. *John Slade*, the waiter at the tavern, proved, that a man and a woman came to plaintiff's house (who looked like fellow-servants) between nine and ten o'clock, one evening in *Easter* week, a few minutes before this imprisonment was done; that they appeared to be honest sober persons, and came to refresh themselves; that he saw the defendants armed with bludgeons, take and seize the plaintiff, his mistress; that *Allen* laid hold of her, and said, "Now damn you

" for

" for a bitch we have got you, and we are
 " determined you shall go to New-Prison ;"
 other witnesses gave evidence to the like effect ;
 that these defendants called themselves re-
 formers ; about twenty witnesses proved the
Rummer tavern to be a house of good repute,
 and no body proved the contrary ; it was also
 proved that one of the defendants struck the
 plaintiff. That the defendants never prose-
 cuted the plaintiff, nor did they appear against
 her when she went before the justice next day.
 For the defendants, one *William Gardiner*, who
 was accidentally present in court at the trial,
 swore he was at the *Rummer* when this affair
 happened, and that he heard no oaths, nor
 the word *bitch*, &c. It appeared that the
 warrant was granted and signed by Justice
Kynaston, to enter this house, upon an allega-
 tion that the plaintiff kept a loose and dis-
 orderly house ; that they had two warrants,
 one for *London*, and another for *Middlesex*, be-
 cause this house stands partly in and out of
 the city, which they kept five weeks before
 they executed them ; that they frequently
 watched the house, and when they imagined
 any lewd persons went into the house they
 took that opportunity to execute the warrant ;
 this is the substance of the evidence, where-
 upon the jury found for the plaintiff, and 300 l.
 damages.

Chief Justice.—1st, As the defendants made
 a defence at the trial, the court will not set
 aside the verdict for the variance between the
 issue book delivered in paper ; and the record
 of *nisi prius*, which was not mentioned or ob-
 jected to, at the trial ; and if the record of
nisi prius had been wrong, the court would
 have

have amended it by the roll, after a verdict and a defence made.

2nd, As to the excessiveness of damages; courts should be very cautious how they overthrow verdicts that have been given by twelve men upon their oaths; however, if damages be unreasonable and outrageous indeed, as if 2000 l. or 3000 l. was to be given in a little battery, which all mankind might see to be unreasonable at first blush; certainly a court would set aside such a verdict, and try whether a second jury would not be more reasonable.

Vide ante.

The rule in the case of *Asb v. Asb*, *Comb.* 357. laid down by Lord *Holt*, is a good one;—
 “ That the jury are to try causes with the
 “ assistance of the judges, and ought to give
 “ their reasons, when required, that if they
 “ go upon any mistake they may be set right;
 “ and for their not doing so, and for excessive-
 “ ness of damages, a new trial was granted.”

And this rule is universal, and extends to all sorts of actions; but it may be said, what rule has the court to govern themselves by as to matters of *tort*? I answer, the court must be able to say the damages are beyond all measure unreasonable, though they cannot say exactly what damages ought to be given. I do not think the damages excessive in the present case; here are a number of persons like a new sort of grand jury, who meet once or twice in a week, and take upon themselves to present, correct, reform, and commence prosecutions; a warrant is granted by *Kynaston*, a reforming justice, on the information of one *Tristram*, who is fled for an abominable crime; there was no account given at the trial of the matter of his information to *Kynaston*, who did not appear, though he was *subpoenaed*; the warrant

is

is pocketed five weeks, the defendants watch and wait 'till they can dodge a lewd woman into the out-rooms of this house, where they had not been five minutes, before the defendants entered with bludgeons, and seized upon the person of the plaintiff, and would have carried her to prison that night, if her neighbours had not then interposed and undertaken that she should appear before Justice *Kynaston* next morning, which she did, but the defendants never pursued the warrant one step farther. I think the king's-bench would grant an information against these persons for setting themselves up as a kind of grand jury; an informer is a most odious character; and I am glad of an opportunity of declaring my dislike towards these reformers. The whole court refused to set aside the verdict, and the plaintiff had judgment.

TRESPASS, assault, and imprisonment; issue joined upon the general issue, not guilty; tried before the Lord Chief Justice, when it was proved for the plaintiff that he is a journeyman printer, and was taken into custody by the defendant (a king's messenger) upon suspicion of having printed the *North-Briton*, number 45; that the plaintiff kept him in custody about six hours, but used him very civilly by treating him with beef-steakes and beer, so that he suffered very little or no damages; the defendant attempted to justify under the GENERAL WARRANT of a secretary of state, to apprehend the printers and publishers of the said *North-Briton*, number 45, by virtue of the *stat. of Jac. I. and the stat. 24 Geo. II. cap. 44.* but was over-ruled by the Lord Chief Justice; whereupon the king's counsel, who were ad-

Huckle v. Mo-
ney. M. 4 Geo.
III. C. B.
2 Willson 205.
A new trial for
excessive da-
mages in assault
and imprison-
ment refused.
Vide Essay I.
[E.] (a.) tit.
Bills of Excep-
tions.

vocates for the defendant, tendered a bill of exceptions; the jury gave 300 l. damages.

It was now moved by Serjeant *Whitaker*, that the verdict might be set aside, and a new trial had; for that it appeared upon the evidence the plaintiff was only a journeyman to *Leech* the printer, at the weekly wages of a guinea; that he was confined but a few hours, and very civilly and well treated by the defendant, so that 300 l. were most outrageous damages in this case, and a new trial he hoped would be granted; and cited *Chambers v. Robinson*, 1 *Stra.* 691. which was an action for a malicious prosecution upon an indictment wherein the jury gave 1000 l. damages, and the court granted a new trial for the excessiveness of the damages; several other similar cases were cited to induce the court to grant a new trial.

Vide ante.

Serjeant *Burland*, for the plaintiff, insisted that in cases of *tort*, which found merely in damages, and are not like *debt* or *assumpsit*, the court will never interpose in setting aside verdicts for excessive damages; that in the case of *Leeman* against *Allen* and other reforming constables, *C. B.* in an action of trespass and imprisonment, the jury gave 300 l. damages; and this court refused to grant a new trial, though the plaintiff had not been imprisoned above 24 hours. And in a late case in *B. R.* for criminal conversation, 500 l. damages were given against a man in very poor circumstances, as appeared to the court by affidavit, and yet they would not grant a new trial, but said they could not interpose in cases of *tort*, unless the damages were very outrageous; but that the jury were the sole judges of the damages.

Vide ante.

Vide ante.

Lord

Lord CHIEF JUSTICE.—In all motions for new trials, it is as absolutely necessary for the court to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure of damages in action of *tort*; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; *torts* or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c. the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages; the few cases to be found in the books of new trials for *torts*, shews that courts of justice have most commonly set their faces against them; and the courts interfering in these cases would be laying aside juries: before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

I shall now state the nature of this case, as it appeared upon the evidence at the trial; a warrant was granted by Lord *Halifax*, secretary of state, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the *North-Briton*, number 45, without any information or charge laid before the secretary of state, previous to the granting thereof, and without naming any person whatsoever in the warrant: *Carrington*, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that *Leech* was the printer of the *North-Briton*, number 45, directed the defendant to

execute the warrant upon the plaintiff (one of *Leech's* journeymen), and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 l. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law, touching the liberty of the subject, appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this GENERAL WARRANT before them; they heard the king's counsel, and saw the solicitor of the treasury, endeavouring to support and maintain the legality of the warrant, in a tyrannical and severe manner: these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages: to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition; a law under which no *Englishman* would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the 29th chapter of *Magna Charta*, *Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale iudicium parium suorum vel per legem terræ, &c.* which is pointed against arbitrary power, was violated.

I cannot say what damages I should have given, if I had been upon the jury; but I directed

directed and told them they were not bound to any certain damages, against the solicitor-general's argument. Upon the whole I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for *torts*; it must be a glaring case indeed of outrageous damages in a *tort*, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

BATHURST, *Justice*:—I am of my lord's opinion, and particularly in the matter of damages, wherein he directed the jury that they were not bound to certain damages: this is a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers, have had verdicts for 200*l.* in each cause by consent, after two of the actions were fully heard and tried.—CLIVE, *Justice*, absent.

Per curiam, new trial refused.

THIS was an action of trespass and false imprisonment; the plaintiff declared that on the 11th of *November*, 1762, the defendants broke and entered his dwelling-house at *London*, in the parish of *St. Stephen, Wallbrooke*, in the ward of *Wallbrooke*, and continued therein four hours, disturbed him in his possession, broke and forced open several doors of the rooms, and broke and spoiled the locks, bolts, and bars thereof, and broke and forced open many boxes, chests, bureaux, scrutores, writing-desks, drawers, and cup-boards of the plaintiff, in his house, and the locks thereof, and searched and examined all the rooms in the house, and all the boxes, &c. so broke open, and read over, pryed into, and examined all the private papers, books, letters, and correspon-

Arthur Beardmore, an attorney, v. Nathan Carrington, James Watson, Thomas Ardron, and Robert Blackmore, four of the king's messengers in ordinary.

Er. Tm. 4 Geo. III. 1764.

A new trial was refused in an action of trespass and imprisonment under a secretary of state's warrant, where 1000*l.* damages were given for six days imprisonment, and the entering plaintiff's house, and seizing his books & papers,

dence of the plaintiff and his clients, whereby the secret and private affairs, concerns, business, and circumstances of the plaintiff, and his clients, became and were wrongfully discovered, and made public; and then and there seized, took, and carried away 500 printed charts, and a great many other papers, printed and written, (particularly mentioned) and took, and closely imprisoned the plaintiff for nine months, whereby he was hindered from following and transacting his lawful affairs and business, and was thereby put to great expences in his maintenance during his imprisonment; and in obtaining his legal discharge and release therefrom, against the peace, &c. to the damage of the plaintiff 10,000*l*.

The defendants pleaded first, not guilty; and, 2dly, by leave of the court, as to the breaking and entering the dwelling-house, continuing there, disturbing the plaintiff in his possession, forcing open the said doors, forcing open the boxes, chests, &c. and examining his private papers, &c. and carrying away the goods, &c. and imprisoning the plaintiff and detaining him for six days and an half; they plead that the plaintiff ought not to have his action against them, because they say, that before the trespass, &c. was supposed to be committed, *viz.* on the 6th of *November*, 1762, the Earl of *Halifax* was, and yet is one of the lords of the king's privy council, and one of his principal secretaries of state, and that he on the 6th of *November*, 1762, made his warrant under his hand and seal, directed to the defendants, four of the king's messengers in ordinary, by which warrant the earl did, in the king's name, authorise and require them, (the defendants) taking a constable to their assistance,

assistance, to make strict and diligent search for the said *Arthur Beardmore*, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intituled the *Monitor*, or *British Freeholder*, number 357, 358, 360, 373, 376, 378, 379, and 380. London, printed for *J. Wilson* and *J. Fell*, in *Pater-noster-row*; which contained gross and scandalous reflections and invectives upon his majesty's government, and upon both houses of parliament, and him the said *Arthur Beardmore* having found, to seize and apprehend, and to bring him, together with his books and papers, in safe custody, before the said Earl of *Halifax*, to be examined concerning the premises, and further dealt with according to law, &c. That the said warrant was, that day, delivered to the defendants to be executed; that they took *C. W.* a constable, to their assistance, and on the same day in the declaration, they went towards the plaintiff's house and found him near to it, and did there seize and apprehend him by virtue of the warrant, and immediately the same day, about ten o'clock in the forenoon, being the time when, &c. entered his dwelling-house, (the door being then open) to search for, and seize the books, papers, &c. of the plaintiff, and to bring them with the plaintiff, before the Earl of *Halifax*, according to the exigency of the warrant; and so the defendants go on and justify the trespass aforesaid, and say they delivered the books, papers, &c. to *Lovel Stanhope*, an assistant of the Earl of *Halifax*, and a justice of peace for *Westminster*, to be examined; and that they kept the plaintiff in custody, 'till he gave bail for his appearance in the king's-bench, the then

next term, to answer such matters as should be objected against him; and then the defendants, by order of the Earl of *Halifax*, discharged the plaintiff, and they say that he was necessarily put to expences by such detainer, which is the same trespass complained of. There is another justification much to the same purport. The plaintiff replied *de injuria sua propria*, whereupon issue was joined; and at the trial the jury were directed to assess damages, under an idea that the trespass and imprisonment committed under this warrant, could not be justified by any plea whatsoever; and they found a verdict for the plaintiff, and gave him 1000 l. damages.

It was moved by the king's serjeants that the verdict might be set aside, for excessive damages; upon shewing cause, the Lord *Chief Justice* stated the substance of the evidence given at the trial as follows:

The plaintiff called his clerk, *David Meredith*, who proved, that on the 11th day of *November*, 1762, he found all the defendants in the plaintiff his master's house, and in the private office *there*, opening the drawers and taking out papers; that they demanded the plaintiff's file of letters, and examined them back 'till the year 1752. Defendant *Carrington* then said, "that was sufficient;" afterwards they went into the public office, and there opened the desk, took out the books, and looked into the ledgers, but did not break any desks or drawers open, because the plaintiff opened the same for them; afterwards they took the plaintiff and this witness away in a coach; this witness proved that the plaintiff was then concerned in a great many causes depending, as an attorney, that he sent for Mr.

Wimbolt,

Wimbolt, to manage his business while he should remain in confinement; that no violence was offered to the person of the plaintiff, and that his wife was permitted to be with him; that this witness had actions depending against the defendants and Lord *Halifax*; that the defendants refused to permit one Mr. *Collet*, who was a client of the plaintiff, to converse privately with him about his business; that while the plaintiff and this witness were confined in the house of the defendants, he the plaintiff was suffered to go into any part of the house, and after six days imprisonment, they were both discharged, upon entering into recognizances to appear in the king's-bench the then next term, and for their good behaviour, without paying any fees.

Mr. *Collet*, a client of the plaintiff, swore that the plaintiff was concerned in some causes for him at that time, and that he desired to speak with him in private about his business, but he was refused by the defendants to speak to the plaintiff privately, and to write down what he wanted to say; that pen and ink were refused to him, but the defendants told him he might speak publicly to the plaintiff, in the hearing of the defendants if he pleased; it was also proved that the plaintiff was then refused the liberty of writing a letter to Mr. *Alderman Beckford*, one of the members of parliament for the city of *London*; this was the substance of the plaintiff's evidence.

For the defendants, *Lovel Stanhope*, esq; deputy secretary of state, assistant to Lord *Halifax*, was called, who swore that his business was to look into, and examine all papers touching the government; that he took an oath of office, and was to pay obedience to the

the orders of the secretary of state; he said that on these occasions, when the messengers have a man in custody, they are not to do any thing without his orders; that Lord *Halifax* ordered the plaintiff to be bailed, and that he was continued upon his recognizance from term to term for several terms. It was admitted on all sides at the trial, that there have been a great many precedents of warrants of the like sort with the present, for the seizing persons and papers, &c. and for all sorts of crimes or offences, let the offence be what it would; and this was the substance of the defendants evidence.

For the defendants it was said, that for six days and an half confinement in a messenger's house, where little or no injury had been done either to the plaintiff's person, house, or goods, 1000 l. were excessive and outrageous damages, and that if the court saw that they were excessive, they had power to grant, and would grant a new trial, even in cases of *tort*. It is said the case of *Wood and Gunston*, *Styles* 466. *Mich.* 1655. is the first instance of granting a new trial; but this seems to be a mistake, for there were new trials granted long before, as appears from this, *viz.* that it is a good challenge to a juryman to say, that he hath been a juror before in the * same cause: *per Holt. C. J.* 2 *Salk.* 648. It is true that in *Roe and Hawkes*, 1 *Lev.* 97. † it is said by *Twisden*, Justice, that the new trial in *Wood and Gunston*, was not merely granted for excessiveness of damages, but for tampering with the jury; but in 1 *Sid.* 131. and in 2 *Mod.* 151. it is said that the new trial in *Wood and Gunston* was for excessiveness of damages; that was an action for words, and is a case in point, that the court

Vide ante.

* This might be in the case of a venire facias de novo awarded, where a mis-trial has been had.

† Vide ante.

has

has power to grant new trials in cases of *tort* for excessive damages. Supposing new trials first began in the reign of *Charles* the First, yet it appears from the Year-books, long before that time, that courts of justice (not having then come into granting new trials) when they saw reason for it, either lessened or increased the damages, as they do in the case of *maibem* to this day, upon view of plaintiff's *maibem*, and identifying his person; and for this purpose these cases were cited from the Year-books, *Mich.* 22 *Ed.* III. fol. 11. c. 10. which was a battery. *Mich.* 3 *Hen.* IV. fol. 4. c. 16. *Mich.* 7. *H.* IV. 31. b. c. 15. in conspiracy, where the plaintiff released part, or the court would have abridged the damages according to their conscience. *Easter*, 8 *Hen.* IV. fol. 23. c. 9. the Justice of *Nisi Prius* thought the damages too little, yet they would not increase them without seeing the *maibem*. *Mich.* 19 *H.* VI. 10. b. c. 28. *Trin.* 32 *H.* VI. 1. a. c. 2. in debt the parties were at issue, and the jury found for the plaintiff damages 6 s. 8 d. and costs 20 s. the court increased the damages to 13 s. and 4 d. more. *Dyer* 105. *Palm.* 314. From these ancient cases it was argued, that courts of justice have, in all times, considered themselves authorised to review the damages given by juries, in all kinds of actions, and either to abridge, or increase them; and since that practice has been disused, and abridging damages by the court has been looked upon as unconstitutional, new trials have been granted for excessive damages.

For the plaintiff it was said, that new trials can only be granted in cases where the court can clearly see that the jury is mistaken, or have misbehaved themselves; all the cases of

new trials tend to prove, that where the court have no measure to direct them, they cannot grant a new trial, there must be some infallible mark for them to go by in the case; no two judges in the world can agree what damages ought to be given in the present case, for damages here lie in speculation. That the misconduct of juries seems to have been the first occasion of new trials. It is said new trials were first introduced to prevent attainments; but an attainder would not lie in this case, for there is no possibility of pointing out how far the damages are excessive or not. The case in *Styles* 466, was not for excessive damages, but for tampering with the jury; it was said in that case to be a *packed business*. In the case of Lord *Townshend* for words, 2 *Mod.* 150. the court said they had no ground whereby they could measure the damages, and refused a new trial. *Asb* and *Asb*, *Comb.* 357. is not to the purpose; Lord *Holt* asked the jury upon what ground they went, but they refused to answer him, and so were guilty of a misconduct.

Vide ante.

Vide ante.

Curia. We are called upon, on our oaths to say, whether these are excessive damages or not, and ought to have very clear evidence before us, before we can say they are excessive. The jury were directed to assess damages for the plaintiff according to the evidence given, under an idea that the defendants could not by law justify the trespass under this warrant, by any manner of plea whatsoever. It is clear that the practice of granting new trials is *modern*, and that courts anciently never exercised this power, but in some particular cases they corrected the damages from evidence laid before them. There is great difference

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ference between cases of damages which be certainly seen, and such as are ideal; as between *assumpsit*, *trespass for goods*, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal. There is also a difference between a principal verdict of a jury, and a writ of inquiry of damages; the latter being only an inquest of office, to inform the conscience of the court, and which they might have assessed themselves, without any inquest at all; only in the case of *maibem*, courts have in all ages interposed in that single instance only. As to the case of the writ of inquiry in the Year-book of *H. IV.* we doubt whether what is said by the court in that case be right, *That they would abridge the damages, unless the plaintiff would release part thereof*, because there is not one case to be found in the Year-books, where ever the court abridged the damages after a principal verdict; and this is clear down to the time of *Palmer's Rep.* 314. much less have they interposed in increasing damages, except in the case of *maibem*. One side says no *attaint* lies (in cases of *tort*) for excessive damages; the other side says it does: we give no opinion as to that point; but it is said in a hundred cases in the books, that an *attaint* does lie. See 10 *Rep.* 119. Lord *Cheyney's* case.

All, or most of the cases of new trials, are where juries have * misdemeaned themselves contrary to their oath; in the case in *Styles* 466. the misconduct of the jury was certainly an ingredient, and so it appears from the case in 1 *Lev.* 97. Some books say it was a trial

* The Judge who tried the cause, used to certify to the court the misbehaviour. *Gro. El.* 189, 411, 616. 3 *Keb.*

at

357. Styl. 448.
Moor. 451, 452.
Bacon v. Hutch-
inson, Easter
term, 8 Ann.
C. B. a rule to
stay the judg-
ment until the
judge's certifi-
cate; Palm.
325. Concern-
ing misdemeanor
of juries, see 2 H.
P. C. 306, 307,
&c. Cro. Jac.
210. c. 2.

Vide ante Wil-
ford and Berk-
ley.

at bar, and it is highly probable there was some evidence, that the jury had been tampered with; and this was certainly the very first case of a new trial; and from that period the courts have exercised the power of granting new trials in several cases: as when the jury find contrary to the judges directions in point of law; when they find directly contrary to the evidence; (that is to say,) against evidence all one side, for if there be evidence on both sides, the court never interposes in that case. As to the granting the first new trial in *Styles* 466, there is great reason (as was said before) to think it was for misbehaviour in the jury; it was an action for words; so was the case of Lord *Townshend*, 2 *Mod.* 250. for words, and 4000 l. damages, where the court refused to grant a new trial. And if a court could not say that those damages were excessive, they can hardly say that damages are excessive in any case of slander whatever; and this case has never been contradicted, or denied to be law. The case of *Asb* and *Asb*, *Comb.* 357. was plainly for the misdemeanor of the jury, in refusing to answer the judge, when he asked what ground or reason they went upon. To be sure judges are to advise, but not to controul juries; and my Lord *Holt* and the King's-Bench did right, in granting a new trial in that case. In the case of *Wilford v. Berkley*, *Trin.* 31 and 32 *G. II. B. R.* which was an action for criminal conversation, the jury gave 500 l. damages against the defendant; and, upon affidavits that he was only a clerk in low circumstances, and unable to pay so large a sum, it was moved for a new trial; but the court refused to grant even a rule to shew cause, because in cases of *tort*, the

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the jury are the only proper judges of the damages.

We are now come to the case in 1 *Str.* 691. *Chambers v. Robinson*; which seems to be the only case where a new trial was granted merely for the excessiveness of damages only. We are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the court could pronounce the damages to be excessive; the principle on which it was granted, mentioned in *Strange*, was *to give the defendant a chance of another jury*: this is a very bad reason; for if it was not, it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say, this case is not law; and that there is not one single case, (that is law,) in all the books to be found, where the court has granted a new trial for excessive damages in actions for *torts*.

It was strongly argued at the trial of this cause, that the jury were to measure the damages by what the defendant had suffered by this trespass, and six days and an half's imprisonment; but this was thought a gross absurdity by the judge who presided there.

Markham v. Middleton, Tr. 19 Geo. II. B. R. Per Curiam, the jury are the sole judges of the damages in cases of torts.

We desire to be understood that this court doth not say, or lay down any rule, that there can never happen a case of such excessive damages in *tort*, where the court may not grant a new trial; but in that case, the damages must be monstrous, and enormous indeed, and such as all mankind must be ready to exclaim against at first blush.

The nature of the trespass in the present case is joint and several; and the plaintiff has still another action against Lord *Halifax*, who,

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it is said, is more culpable than the defendants, who are only servants, and have done what he commanded them to do, and therefore the damages are excessive as to them: but we think this is no topic of mitigation; and, for any thing we know, the jury might say, "we will make no difference between the minister who executed, and the magistrate who granted this illegal warrant:" so the court must consider these damages as given against Lord *Halifax*; and can we say that 1000*l.* are monstrous damages as against him, who has granted an illegal warrant to a messenger, who enters into a man's house, and pries into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days? It is an unlawful power assumed by a great minister of state. Can any body say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects? We cannot say the damages of 1000*l.* are enormous; and therefore the rule to shew cause why a new trial should not be granted, must be discharged. *Per totam Curiam.*

Hil. 8 Geo. II.
B. R. Smith v.
Boucher.

In trespass and imprisonment, damages on a writ of inquiry 200*l.* *Skinner* moved to set it aside for excessive damages; but *per Curiam*, in *tort* the jury are the proper judges.

Grey against Sir
Alexand. Grant,
Bart. a member
of parliament,
T. 4 G. III. C.
P. 2 Wilton 252.
In a little as-
sault and battery
200*l.* damages
not excessive,
and a new trial
refused. Plain-
tiff and defen-

This was an action of assault and battery, tried at *Guildhall, London*, wherein the jury gave a verdict for the plaintiff, and 200*l.* damages; and now it was moved to have the verdict set aside, and a new trial, for excessiveness of damages. The case upon the evidence was as follows:

Captain

Captain *Holland*, of the ship *Nancy*, having brought from the *West-Indies* a turtle for the plaintiff, Mr. *Grey*, and which was his property, and it having been, by mistake, delivered to the defendant, the plaintiff went to him, and demanded it of him; but he said he had invited some friends to dine with him upon it, and refused to deliver it, or to pay for it, and that the plaintiff might take his remedy; and pointing at the plaintiff, said, "If *that man* was to ask a turtle of me, I "would give him one;" the plaintiff answered and said, this is very ungentle; and the defendant shoved the plaintiff out of his house with his elbow; who thereupon asked the defendant if he would waive his privilege of parliament, but the defendant refused to do it; plaintiff then said to him, you are a scoundrel, and defendant gave him a blow upon the face, which caused a black eye; the plaintiff also demanded the turtle by a letter, and required the defendant to restore it; Captain *Holland* also informed the defendant, that the turtle had been delivered to him by mistake, and desired him to restore it; but the defendant said, "*A turtle I have got, and what I have got I will keep.*" The captain told the defendant, if he wanted a turtle to entertain his friends, there was one then at the *Jamaica* coffee-house to be sold, and he might buy *that*; the defendant answered, "You may "buy it yourself, I will keep *that* I have got." Then the plaintiff said to the defendant again, I come here to demand my right, and if you will not give it me, I will take my remedy at law, if you will waive your privilege; the defendant answered and said, "In such a trifling "business as this I will not waive my privilege."

dant men of rank, and the latter had treated the former with great contempt.

"lege, but in a matter of property I would waive it." One *Falconer* was called as a witness, to prove that he was present at this dispute, and could not remember that any blow was struck by the defendant; he had forgot every thing which made in favour of the plaintiff, but remembered every thing which made for the defendant; so it was a measuring cast whether a blow was struck or not: however, the jury found for the plaintiff, and 200*l.* damages.

Curia. This was a quarrel between two gentlemen, and has been properly tried by a special jury of merchants of *London*, who are the proper judges of the damages. When a blow is given by one gentleman to another, a challenge and death may ensue; and therefore the jury have done right in giving exemplary damages. The plaintiff has been used unlike a gentleman by the defendant in striking him, with-holding his property, and insisting upon his privilege; all of them tending to provoke him to seek his revenge in another way than by law: and therefore we think the damages are not excessive. Rule to shew cause why a new trial should not be had, discharged *per totam Curiam*.

Gilbert v. Bur-
tenshaw, M.
15 Geo. III. B.
R. Cowp. 230.
In personal torts,
the court will sel-
dom grant a new
trial for excessive
damages. Ma-
licious prosecu-
tion for perjury,
and for words
after the acquit-
tal, charging
plaintiff with
the crime;
400*l.* or 500*l.*
damages; new
trial refused.

This was an action for maliciously indicting the plaintiff for perjury. The second and third counts were for defamation, in saying the plaintiff was a perjured knave and scoundrel, (after acquittal,) and he would prove it.

Upon shewing cause why a new trial should not be granted on the ground of excessive damages, it appeared by the report of Lord Chief Baron *Smythe*, before whom the cause was tried, that his Lordship directed the jury, in case they were of opinion that there was malice,

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malice, and no probable cause, to find a verdict for the plaintiff; but if they thought there was a probable cause, then to find a verdict for the defendant. The jury found a verdict for the plaintiff, damages * 400 l. and his Lordship reported that he was very well satisfied with the verdict. Q 300 l.

Mr. *Dunning*, Mr. *Lade*, and Mr. *Morgan*, in support of the rule, were instructed to say, that the acquittal upon the indictment for perjury was by mistake, and not upon the merits; and in respect of the damages they insisted, that, as no special damage was laid or proved, the sum of 400 l. was much too severe and excessive.

Mr. Justice *Willes*, who tried the indictment against *Gilbert* the plaintiff, explained what passed at that time, and said, that, after a trial of six hours, it was an acquittal upon the merits, and very much to his satisfaction.

LORD MANSFIELD.—This rule comes before the court singly on the judge's report. It is not an application on the ground of surprise, or of new evidence, that has been discovered since the trial; nor upon the ground, which counsel were instructed to mention to the court, when it was first moved, namely, that, from the hurry of summing up, the jury were misled to think, that declarations accusing the plaintiff of perjury, were left to the jury, when, in fact, no such evidence was given. By the report it appears, that that suggestion is totally untrue, and that there was strong evidence of such declaration being made by *Burtenshaw*, after the trial of the indictment.

The verdict is taken upon two counts: upon the first, "for maliciously indicting the plaintiff

"tiff of perjury;" and upon the second, for calling him "a perjured rascal, and saying he "would prove it." There was evidence in support of both counts. Therefore the whole ground of the application rests on the point of excessive damages. I should be sorry to say that, in cases of personal torts, no new trial should ever be granted for damages, which manifestly shew the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed; and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel, that, if they had been on the jury, they would have given less damages, or where they might think the jury themselves would have completely discharged their duty, in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their sound discretion, than such a case as this; and, unless it appears that the damages are *flagrantly outrageous* and extravagant, it is difficult for the court to draw the line.

But in this case, where the defendant has been guilty of repeated defamation against the plaintiff, after a fair trial and acquittal, upon a malicious prosecution, it is impossible for the court to go into a nice examination and admeasurement of what ought to have been the damages.

ASTON, *Justice*.—I am clearly of the same opinion; and in the present case I should doubt, even if it stood upon the second count only, whether the court ought to interpose on account of the largeness of the damages, in favour of a man who has been guilty of charging another with so foul a crime as is there

laid,

laid, and declaring in public that he would prove it upon him.

Mr. *Justice* WILLES, and Mr. *Justice* ASH-HURST, were of the same opinion.

Rule for a new trial discharged.

ACTION of assault. Verdict for 150 l. *Mingay* moved to set it aside, on account of excessive damages.

LORD MANSFIELD said, there was no doubt but that the court had a power of taking the opinion of a second jury, in any case where the damages were excessive: but all these questions depended on their own circumstances, on which the court would exercise their discretion.

But in this case, upon hearing the report of the judge, the court thought fit to reject the motion (a.)

On a motion to set aside a writ of inquiry for *excessive damages*, it appeared that the plaintiffs were the indorsees of a bill of exchange drawn here by *G. Campbell*, for 2,800 star pagodas, payable to the defendant or order, and directed to *G. Mowbray*, Esq; at *Madras*. The plaintiffs discounted the bill, giving the then current price of the exchange, which was 6 s. 6 d. *per* pagoda. They sent it to *Madras*, from whence it was returned to *England*, protested for non-acceptance, and also for non-payment; on which the plaintiffs had demanded and recovered at the rate of 10 s. *per* pagoda, and 5 l. *per cent.* from the expiration of thirty days after notice to the defendant of it being returned.

Wood shewed cause, and contended that this could not be considered as an usurious demand, because the usage, as well as the par-

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ticular

Duckerv. Wood,
T. 26 G. III.
B. R. Durnford
and East, 1 V.

277.
The court may
in any case grant
a new trial upon
the ground of
excessive da-
mages.

(a) Vide 2 Will.
405. and 3 Will.
62.

Auriol and ano-
ther against
Thomas, Trin.
Tm. 27 G. III.
B. R. Durnford
and East, 2 V.

52.
Where a bill in-
dorsed over is not
duly paid, the
indorsee may
charge the in-
dorsor with in-
terest, exchange,
and other inci-
dental expenses,
beyond the
amount of 5 l.
per cent. if such
charges are rea-
sonable, war-
ranted by usage,
and not made a
colour for usury.
The charge of
10 s. *per* pagoda
on a bill return-
ed protested from
India is not ex-
cessive,

though it was taken in payment here at the rate of 6 s. and 6 d. per pagoda.

ticular agreement of the defendant, had been proved before the jury to charge at the rate of 10 s. *per pagoda* for bills returned from *India* protested, and 5 l. *per cent.* after thirty days notice to the defendant of non-payment, which included all incidental charges.

(a) *Summer v. fites at Hereford, 1780.*

Philips, in support of the rule, cited the case of *Benson v. Parry* (a), where it had been held to be usury for country bankers to take more than 5 l. *per cent.* on inland bills payable at another place; and if the practice be contrary to law, no usage could make it good.

(b) *Ashhurst, J.* was absent.

(b) *BULLER, J.*—The case of *Benson v. Parry*, at *Hereford*, was determined on a mistake; but, when it was more maturely considered by this court, on a motion for a new trial, they were unanimously of opinion, that extra charges might be allowed, though they amounted to more than 5 l. *per cent.* if they were fair and reasonable, and not as a colour for usury; and there a new trial was granted. This doctrine was again recognized in two *Nisi Prius* cases, the one before the Lord Chief Baron *Eyre*, on the circuit, the other before me at the sittings at *Westminster* (c). So that it is now clearly settled, that the party is intitled to take not only 5 l. *per cent.* for legal interest, but also a reasonable sum for remitting, and other necessary incidental expenses. The demand, in the present case, arises upon a bill of exchange, payable in *India*, which, if not paid there when due, would carry the interest allowed in that country; and it is admitted that the constant course with respect to bills returned protested from *India*, has been to allow at the rate of 10 s. *per pagoda*, which includes

(c) *Winch qui tam v. Fenn*, Sitt. after H. 1786, B. R. That was an action for usury against the defendant, who was a country banker living at *Sudbury*. It appeared on the trial, that the practice was to discount bills in *London* for various correspondents at *Sudbury*, and for

includes interest, exchange, and all other charges. There cannot, therefore, be any colour for saying that this transaction is usurious.

GROSE, J.—The same doctrine has been confirmed in the court of Common-Pleas; and the line which has been taken is, that, if the sum charged be not a colour or a screen for usury, but is only fair and reasonable, it ought to be allowed. This is like the case some few years ago, where *Indian* interest was allowed here on a bond given in *India* (a).

Rule discharged.

(a) *Bodily v. Bellamy*, 2 Burr. 1094.

which they had 51. per cent. for the time the bills had to run; and they had also 5s. per cent. on the gross sum, without any reference to the time which the bill had to run: this commission had been taken by the defendant on the bills in question, and the jury found a verdict for the defendant under the judge's direction.

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VII. For

VII. For insufficient Damages.

Anonymous. M.
10 W. III. B.R.
2 Salk. 647.

New trial, or writ of inquiry, not granted for too small damages, unless where there is a trick. Here the plaintiff intitled to a specific sum, and the jury ought not to give less, except defendant proves something in mitigation.

IN covenant to pay a sum certain, viz. 100 l. and a grant that upon default it should be lawful for the covenantee to enter and take the profits; the defendant pleaded entry and *prizal del profits* in bar, and judgment was for the plaintiff, upon demurrer, and upon the writ of inquiry the jury gave damages, and upon motion a new writ of inquiry was awarded; for debt might have been brought upon this covenant; and this is not like an issue where the jury are to give no more damages than are proved: but here the jury are to give the *whole*, unless the defendant proves something in mitigation, which was not done in this case; therefore, the common rule holds, viz. that no new trial, or new writ of inquiry, shall be for too small damages, yet there being a contrivance in this case, it differs. *Vide* the next case.

Woodford vers.
Eades et al, Eas.
Tm. 7 Geo. II.
1 Stra. 425.

The court set aside verdict for smallness of damages.

Vide ante.

Anon. Ca. from
Salk. 647.

The jury mistaken in point of law, in giving nominal damages, where plaintiff was intitled to real damages.

On a contract for stock between the plaintiff and J. S. they each deposit 200 l. in the hands of the defendant, and J. S. not performing his agreement, the plaintiff sues for the deposit, and had judgment on demurrer, and took out a writ of inquiry, and proved his case; but the jury, on a notion that the defendant could not pay out the money without consent of both parties, gave one penny damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the smallness of the damages, did not extend to this case, where

where the jury mistook in point of law; and the Chief Justice said he knew no reason why the court should not interpose in the other case.

An action was brought for these words spoken of the plaintiff as a wine-merchant; "You are a rogue, villain, and rascal, and sell by short measure;" and the jury gave twenty shillings damages: and though it was thought a hard case, yet the court said it has always been denied to set aside a verdict for smallness of damages, and therefore denied it in this case.

In case for a malicious prosecution of an indictment for felony, the jury found for the plaintiff, and gave five shillings damages. And upon motion for a new trial, on account of the smallness of damages, the court held there could be no new trial on that account: for this was not a false verdict, as finding for the defendant would be, and would subject them to an attain; whereas they having found rightly for the plaintiff, no attain would lie. And new trials came in the room only of attainments, as a more expeditious and easy remedy.

This was an action upon the statute of *Scan. Mag.* for the following words spoken of the plaintiff; *G—d—m my Lord G—r, he is a rogue, and all on his side are rogues: if the mob would stand by me, I'd drive them all, or lay the town in heaps.* The words were proved upon the trial, notwithstanding which the jury only found twelve-pence damages. *Darnal*, for plaintiff moved to set aside the verdict, by reason of the *smallness* of the damages; but not being able to produce any instance of a verdict's being set aside, merely for that reason, though for *excessive* damages verdicts have been frequently

Hayward v. Newton. M. 6 Geo. II. B. R. 2 Stra 940. Verdict not to be set aside for smallness of damages, where they are uncertain, as in action for words. Vide ante. Woodford v. Eades.

Barker v. Sir Wolston Dixie. T. 9 Geo. II. B. R. 2 Stra. 1051. No new trial for smallness of damages, the same being uncertain. A malicious prosecution. Vide ante Anon. Ca. et Woodford and Eades, et Hayward v. Newton.

Lord G—r v. Heath. T. 13 Geo. II. C. P. Barnes 445. In Scan. Mag. tho' only 12 d. damages given, the court refused to set aside the verdict.

frequently set aside, and in point of reason there is the same cause for setting aside one as the other; yet as the difference hath been always taken, and practice long settled, *per cur.* we can make no rule.

Tutton v. Andrews. T. 14 & 15 Geo. II. C.P. Barnes 448. Inquisition set aside, and new inquiry granted, the sheriff having admitted defendant to give improper evidence, whereby the damages were lessened.

The sheriff, on the execution of a writ of inquiry of damages, admitted improper evidence to be given by defendant, whereby the damages were lessened; the court ordered the inquisition to be set aside, and gave plaintiff leave to execute a new writ of inquiry. A notion has prevailed, that where damages are excessive, a new trial, &c. may be granted; but not where damages are less than they ought to be, though there is as much reason for a new trial, &c. in the one case as the other. *Burnett*, for plaintiff; *Gapper*, for defendant.

Russell v. Ball, an assumpsit. E. 18 Geo. II. Barnes 455. Money paid into court. Plaintiff did not take it out. Tried cause. Recovered only sum paid in. Motion to set aside verdict on two grounds. 1st, One of the jury summoned did not appear, but his son, who was sworn. 2^d, Damages too small. Verdict set aside on the first ground, not on the second, this being a case of uncertain damages.

Defendant paid twenty-five pounds into court on the common rule; plaintiff refused to accept the money, proceeded to trial; and on a full hearing of the merits, had a verdict for 25 l. the exact sum paid into court; in consequence whereof, plaintiff, not having recovered more, was, by the rule, liable to pay costs to defendant; to avoid which, plaintiff moved to set aside the verdict; objecting, that the cause was tried by eleven jurors only. It appeared that one *John Pearce*, summoned on the jury, did not appear, but his son of the same name, not qualified, attended the assizes, and when the father was drawn, and called, answered for him, and was sworn on the jury.

Plaintiff also objected to the smallness of the damages found. *Per cur'.* Attaint will not lie against jurors for finding too small damages. Where a demand is certain, as by promissory note, the court will set aside a verdict for too small

small

small damages, but not where the damages are uncertain; as in this case, for curing a wound. But the verdict by eleven jurors only is no verdict; it is null and void.

Rule absolute to set aside the verdict, without costs. *Vide Norman against Beaumont, Mich.* Post IX. (4.) 18 Geo. II.

Belfield, for plaintiff;

Draper, for defendant.

Qu. If a case, nearly similar, hath not lately been determined in *B. R. contra.* Here were 12 jurors.

This was an action upon a policy of insurance on goods, on board the ship *Devonshire*, at and from *Jamaica* to *London*, which insurance was stated upon the head of the policy to be made "on account of *Robert Kerr, esq.*" The plaintiffs were merchants in *London*, and the general consignees of *Kerr*, who was a planter in the island of *Jamaica*. They were in the constant habit of procuring insurance upon his goods, as soon as they received advice of their being shipped. On the 23d of *December*, 1782, the plaintiffs received advice from *Kerr* of having shipped ten hogsheads of sugar on board the *Devonshire*, in which letter, dated 18th of *October*, 1782, was contained a general direction to insure whatever goods were shipped by him. The insurance was immediately effected, but in the month of *November*, between the time when the order was sent, and the time when the defendant subscribed the policy, *Kerr* had indorsed the bill of lading to one *Dellpratt*, in *Jamaica*, to whom there was an arrear of interest due upon mortgage on *Kerr's* estate in that island. The plaintiffs had notice of this indorsement, after the insurance was made, by a letter from *Kerr* to them, wherein

Hibbert and others against *Carter*. E. 27 Geo. III. B. R. *Durnford* and *East*. 1 V. 745. The indorsement and delivery of a bill of lading to a creditor, *prima facie* conveys the whole property in the goods from the time of its delivery. But if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser, after such indorsement, is good. This a question of law, how much plaintiff was intitled to, and the motion was to set aside the verdict, for that the jury, as plaintiff contended, had given him much less than he was intitled unto.

wherein he informed them, that he had been obliged to assign the bills of lading for the net proceeds to *Dellprat*. The bill of lading, as it originally stood, expressed the sugars to be shipped *on account* and *risk* of the shipper, and directed the delivery to his order, or that of his assigns: the indorsement was in the following terms; "deliver the above sugars to Mr. *John Hodgson*, for account of *S. Dellprat*;" signed "*Robert Kerr*." The ship was lost in the course of the voyage.

At the trial of this cause at the last sittings at *Guildhall*, before *Buller*, J. the plaintiffs rested their case here, and contended that upon these facts they were entitled to a verdict for the amount of the insurance. On the other hand it was objected, that *Kerr*, having assigned the bill of lading before the insurance was actually effected, the averment in the declaration that these sugars had been insured *on his account* was not true, for he had not then any insurable interest remaining in him, the entire property in the goods having passed out of him by the assignment of the bill of lading, which operated in this instance as a payment; and *Buller*, J. being of this opinion, upon the general ground that the indorsement of a bill of lading passed the whole property, would have non-suited the plaintiffs; but it appearing that the defendant had neglected to pay the premium of twenty guineas into court, the plaintiffs took a verdict for that sum.

Upon a motion on the part of the plaintiffs in this term for a new trial,

Erskine and *East* contended that the verdict ought to have been taken for the whole sum insured. The indorsement of the bill of lading only bound the consignment of the goods in

England,

England, and cannot be taken to have transferred the whole property out of the consigner in the mean time. He was answerable again to *Dellprat* for the amount of the sugars, in case they did not arrive safe; the bill of lading was put into his hands merely as a collateral security for the debt; he was only to receive the net proceeds; and therefore it cannot be said to be a payment upon the spot, for it is not certain what the net proceeds will be. If so, there did remain an insurable interest in the consigner, for he was to run the risk of the voyage. The case of *Caldwell and Ball* (a) went no farther than to determine that the indorsement of a bill of lading bound the consignment.

(a) *Durnford and East. 1 V. 205.*
Vide ante V.

The principal dispute between the parties was, who should get the consignments of an estate in the *West-Indies*. It is evident from the very terms of this bill of lading, that the risk of the voyage was to be run by the shipper; for, upon the face of it, the goods are expressed to be shipped "on account" and "at the risk of the shipper;" and the indorsement only directing the *delivery* to be "on account" of another person, leaves the *risk* as it was before. But, admitting that by the general law, the indorsement of a bill of lading does transfer the whole property out of the consigner, yet the consigner may recover from the underwriter, as a trustee for the person really entitled. This doctrine seemed to be admitted in the case of *Delaney and Stoddart* (b), which was stronger than the present; for there, there had been an actual sale of the ship insured between the time of sending the order for insurance, and the time when the insurance was actually effected; and there, the action

(b) *Durnford and East. 1 V. 22.*

was

was held to be sustainable against the underwriter, in the name of the vender, though in reality for the benefit of the vendee; so here, perhaps, the inducement for taking the bill of lading, if it is to be considered as an absolute transfer of the property, was the idea of security, from the goods being insured.

The court, however, upon this occasion, were clearly all of opinion, that where a bill of lading is taken by a creditor, as a security for his debt, on his own account, the whole property passes by the delivery, and is to be considered as a satisfaction of the debt *pro tanto*. That the parties were always at liberty to vary from the general rule, by entering into any particular agreement between themselves; but that must be shewn, in order to take advantage of it. They considered the case of *Caldwell* and *Ball* as deciding the general question. And as to the case of *Delaney* and *Stoddart*, there was an agreement that the policy should be transferred.

Vide ante V.

They therefore refused the rule.

But afterwards, on a subsequent day, the motion was renewed, by leave of the court, on an affidavit stating the particular transaction between the parties.

That *Kerr* had no intention whatever of passing the whole property by the indorsement of the bill of lading; his intention being no more than to bind the consignment of the goods in *England*; to which purpose he had ordered his correspondents to pay the *net proceeds* to *Dellprat*, as appears by the letter before-mentioned; and that since that time *Kerr's* executor had actually accounted to *Dellprat* again for the amount of the sugars which had been lost,
a demand

a demand having been made on them to that purpose.

A rule was now granted to shew cause why there should not be a new trial; which was afterwards made absolute, without hearing either side (a).

Verdict for the plaintiffs (b).

(a) The cause came on to be tried a second time at the sittings after *Easter* term, at *Guildhall*, when, the same clear evidence of the intention of the parties being given, as had been set forth in the affidavit laid before the court, Mr. *Justice Buller*, was of opinion, that the plaintiff was entitled to recover the amount of the insurance. He said the general doctrine was clear, that the indorsement of a bill of lading *prima facie* transferred the whole property in the goods, but this was subject to be controlled by the evident intention of the parties. Here advice was sent by the consigner to his correspondents at home, that he had been obliged to give the bill of lading to *Dellprat*, for the *net proceeds*; and the amount of the goods was actually accounted for again by *Kerr's* executors to *Dellprat*, after the loss was known. And besides, what was material to be observed, no value had been put upon the goods at the time, which shewed that *Dellprat* was only to have the *net proceeds*.

(b) *Vide Godin v. the London Assurance Company. Vide ante. L. E. 197.*

VIII. Refusing of Evidence by, or Mis-direction, or Non-direction of the Judge.

Vide post IX. (12.) (a.) *Rex v. Amery*; and IX. (16.) *Buckley v. Buckley*.

Signall v. Devnith. M. 3 Ann. B. R. 6 Mo. 242. The judge refusing legal evidence.

Thomkins v. Hill. M. 1 An. B. R. 7 Mod. 64. Judge allowing or over-ruling evidence, which he ought not to have done.

Anon. M. 1 An. B. R. Salk. 649. S. P. Faresl. 53, 64. v. 6 Mod. 222; 242. Mis-direction.

Taylor, Clerk, v. Walker. Pas. 1729. Excheq. Bunb. 267. Upon an issue to try a modus of 3 s. 4 d. for five closes, it appeared in evidence, it extended to two more. New trial granted, because the judge mis-directed the jury.

Per cur. Good cause of new trial, where the judge, who tried the cause, has denied to admit that for evidence, which was legal evidence.

It was agreed by the court, that if any judge of *nisi prius* allow, or over-rule evidence which he ought not to have done, upon application to the court, they will grant a new trial; for all writs of *nisi prius*, are under the control of the court out of which they issue.

A new trial shall be granted, if the judge of *nisi prius* mis-direct the jury, because those trials are subject to the inspection of the court, *per Holt, C. J.*

Bill was preferred by the plaintiff, as rector of *Checkley*, in the county of *Stafford*, for tithes of five closes in that parish, in the defendant's possession.

The defendant by his answer, insisted, that there was a *modus* of three shillings and fourpence, in lieu of all tithes arising on the five closes, and that no tithes in kind were ever paid: upon the hearing the court directed an issue to try the *modus*, and upon the trial it appeared in evidence, that this *modus* was payable

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payable not only for the five closes, but two closes more particularly named; Mr. Justice *Probyn*, upon this evidence (at *Stafford*) directed the jury, who accordingly gave a verdict for the plaintiff against the *modus*. Now, upon the return of the *postea*, it was moved for a new trial; for that this being an issue to inform the conscience of the court, the defendant ought not to be held so strictly to proof, especially, since no proof of tithes in kind being paid was given; and therefore, though it extended to two closes more, yet it was less than really the prescription was, which he insisted on, and therefore he ought to have had the benefit of the proof, as to five closes only. For the plaintiff it was insisted, that a *modus* ought to be certain, being in bar of common right, and therefore he has failed in the defence he insisted on; and Mr. Justice *Probyn*'s opinion, as certified by Baron *Hale*, was relied on: but *per totam curiam*, a new trial was granted: and they said they could not distinguish this from the case of a prohibition, and cited these cases; *Hetley* 111. 1 *Vent.* 32. *Hob.* 64. 1 *Sho.* 347. 4 *Mod.* 89. *Carth.* 89. *Cro. Eliz.* 531, 722.

This was an action of trespass, *quare clausum fregit*. Defendant pleaded not guilty; and upon the trial before Mr. Baron *Carter*, defendant offered to give in evidence, that the place in which, &c. was the king's highway; but the judge refused to admit that evidence to be given, and plaintiff recovered a verdict. Defendant moved for a new trial, and a rule to shew cause was granted, on payment of costs. Upon shewing cause, several cases were cited on both sides. And it being said, that some judges in the circuit had been of different

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opinions,

Selman v. Courtney. T. 13 and 14 Geo. II.

Barnes 446.

In trespass, defendant pleaded not guilty, and would have given evidence that the locus in quo was the king's highway. The judge refused to admit the evidence.

Verdict for plaintiff. Motion for new trial, but refused.

Majority

Majority of the judges of opinion such evidence could not be given upon the general issue.

opinions, with respect to this point, the court thought it a matter of so much consequence, that it was proper to be considered by all the judges. After a consultation, the Chief Justice declared it to be the opinion of a great majority of the judges, that an highway ought not to be given in evidence under the general issue; but ought to be pleaded specially; and the rule to shew cause was discharged.

Skinner and Prime, for plaintiff; *Belfield and Urlin*, for defendant.

Cases cited for plaintiff, *Watson* against *Sparks*, 1 *Salk.* 287. *Sid.* 106. *Doct. Placitandi* 197. *Crogate's* case, 8 *Co.* 66. *b.* 1 *Inst.* 303. *b.* 5 *C.* 805. 6 *Mod.* 66.

For defendant, *James* against *Hayward*, *Cro. Car.* 184. *Morse* against *Bennett*, 9 *G. B. R.* 2 *Ventris* 297. and in *Shower*.

Abfolon against *Knight and Barber*, in replevin. *E.* 16 *Geo.* II. *Barnes* 450. *Avowry* for rent, in arrear, and issue thereon, with a notice of set-off. The judge rejected the evidence. Verdict for avowant. Motion for new trial, refused, the evidence being properly rejected.

Avowry for rent in arrear, and issue thereon. Plaintiff had given notice with his plea in bar, to set off a mutual debt against the rent, and offered to give evidence of it at last *Berks* assises, before Mr. Justice *Denison*, who refused to admit the same. The question was, whether such evidence ought to have been received or not? And the court were of opinion, that such evidence was properly rejected. This case is neither within the letter nor the intention of the statute. The issue is special and not general. It is not an action upon a personal contract. The rent favours of the realty, and the remedy is by distress. Replevin is a mixed action. The judgment, if for the avowant, must be a return of the cattle. To take the benefit of the statute, plaintiff and defendant must plead properly. In debt on bond, defendant cannot set off under *non est factum*, or *solvit ad diem*; but must plead specially.

Qu. If a set-off could have been pleaded in this case.

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specially. Perhaps by way of special plea to the avowry, plaintiff might have pleaded a mutual debt of more than the rent. There could not have been a set-off by defendants under *non cepit*; nor can there be for plaintiff under *riens in arrere*. The rule to stay the entry of judgment upon the verdict for the avowants was discharged. *Belfield* and *Agar*, for plaintiff; *Skinner*, for avowants.

This matter came before the court, upon a motion for a *new trial*, on the ground of a *mis-direction* by the judge who tried the cause.

It was an action upon the case, upon an *indebitatus assumpsit*, brought by the plaintiffs against the defendants, for monies had and received by the defendants, to the use of the plaintiffs, as assignees of the bankrupt: to which the defendants pleaded the general issue, "that they did not undertake, &c." and issue was joined thereon.

The cause was tried at the *Lancaster* assises, before Mr. Justice *Noel*. A verdict was found for the plaintiffs: and the judge declared himself *satisfied* with the verdict.

It was admitted at the trial, on the part of the defendants, "that *Satterthwaite* was a "trader:" the *debt* of the petitioning creditor was also admitted, and so were the *commission* and the *assignment*; but they disputed the *act of bankruptcy* supposed to have been committed by *Satterthwaite*.

The action was brought for money arising from the sale of goods, consigned by *Satterthwaite* to the defendants, as *FACTORS* for him, (which they had long been,) and sold by them as such; which money was admitted to be in the hands of the defendants, and amounted to

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Monday, 11th February, 1760. Foxcroft et al. assignees of William Satterthwaite, a bankrupt, v. Devonshire et al. H. 33 G. II. B. R. 2 Burr 931. Defendants factors to the bankrupt, had the goods consigned to them. Sold the goods and paid money upon the bankrupt's drafts. Action for money had and received, claiming all the money arising from the sale, except commission and charges. Defendants claimed allowance for money paid, &c. A secret act of bankruptcy proved by plaintiff, which over-reached consignment and sale. Defendants contended they had not notice of the act of bankruptcy, and insisted on their claim under 19 Geo. II. c. 32. Plaintiff contended

tended the transaction, as to payments, &c. was fraudulent, and therefore defendants precluded from entering into the merits, &c.

The judge left it to the jury upon the preliminary point of fraud, who found the transaction fraudulent; upon this defendants moved for a new trial. Court of opinion the conclusion drawn by the jury was wrong.

New trial granted.

* See these letters verbatim, post.

The defendants, on the other hand, had paid several sums of money upon *Satterthwaite's* drafts, and otherwise, to his use, and upon his account.

The plaintiffs at the trial, proved some *secret acts of bankruptcy*, by his being denied to his creditors about *Christmas, 1751*: after which, he appeared again publicly as usual, 'till about the month of *August* following; (as was proved on the part of the defendants.) In *August, 1752*, he totally stopt payment: and thereupon, the commission was taken out; these *secret acts of bankruptcy*, at *Christmas, 1751*, over-reached the consignment to the defendants, the sale, and the time when the money was advanced by them to the use and order of the bankrupt. And the counsel for the plaintiffs produced a series * of letters from the defendants to *Satterthwaite*, which fully proved, as they alledged, "that the defendants were " *privy to his insolvency* at the time when they " advanced the money to his use and order."

The counsel for the defendants would, at the trial, have entered into the two following points; viz. 1st, Whether the defendants were not intitled, as *FACTORS* for *Satterthwaite*, to retain for the general balance of their account: 2dly, Whether they were not within the protection of the statute of 19 G. II. c. 32. §. 1. which, after reciting "that bankrupts frequently commit *secret acts of bankruptcy* " *unknown* to their creditors, and other persons with whom, in the course of trade, " they have dealings and transactions; and " after the committing thereof, continue to appear publicly and carry on their trade and " dealings, &c. and after reciting that the " permitting such *secret acts of bankruptcy*,

" to

“ to avoid and defeat payments *really and*
 “ *bonâ fide* made in the cases, and under the
 “ circumstances before-mentioned, where the
 “ persons receiving the same *had NOT notice of*
 “ *or were privy to* such person’s having com-
 “ mitted any act of bankruptcy, would be
 “ a great discouragement to trade and com-
 “ merce, and a prejudice to credit in general;”
 enacts, “ that no person who shall be *really*
 “ *and bonâ fide* a creditor of any bankrupt, for
 “ or in respect of any *bill or bills of exchange,*
 “ *really and bonâ fide* drawn, negotiated, or
 “ accepted, by such bankrupt, in the *usual*
 “ *and ordinary course of trade and dealing,* shall
 “ be liable to *refund or repay* to the assignees of
 “ such bankrupt’s estate, any money which be-
 “ fore the *issuing forth* of such commission was
 “ *really and bonâ fide* and in the *usual and ordi-*
 “ *nary course of trade and dealing, received by*
 “ *such person of any such bankrupt,* before such
 “ time as the person receiving the same shall
 “ *know, understand, or have notice* that HE is
 “ *become a bankrupt, or that HE is in insolvent*
 “ *circumstances.*”

But the counsel for the plaintiffs objected,
 “ that this transaction of the defendants was
 “ FRAUDULENT; for that they plainly *knew*
 “ and were *apprized* that *Satterthwaite was*
 “ *insolvent at the time* when the effects came to
 “ *their hands.*”

The jury were of this opinion; and gave a
 verdict for the plaintiffs, for the *whole* money,
 except *commission and charges of sale.*

This *previous* point concerning the FRAUD
 having been strongly insisted upon by the
 counsel for the plaintiffs, at the trial, the counsel
 for the defendants were thereby precluded from
 entering into *other* points, which they thought

to be material for their clients, and which they said they were otherwise ready to have entered into at that time. Upon this preclusion they grounded their present motion for a new trial: for they alledged that the jury had founded their verdict upon *wrong conclusions* drawn from the evidence, and upon a *mistake of the law*; and that the defendants had been unjustly precluded from entering into the two preceding points, or any thing else that might have been material to their defence.

And they now insisted, 1st, That the defendants had a *GENERAL lien*, as *factors*, upon the bankrupt's goods consigned to them; 2dly, that they were *purchasers* of them for a *valuable consideration*, without notice that *Satterthwaite* was become a bankrupt, or in insolvent circumstances; 3dly, That in *this* action (upon an *indebitatus assumpsit*,) it is not in the power of the assignees, to affirm the contract *in part*, and deny it *in part*; but if they *affirm it in part*, they affirm it *in toto*. Now here, they *do affirm it in part*; they affirm part of their conduct, as *factors*: therefore they *cannot disaffirm* the rest of their conduct as *factors*.

They said that the present verdict would not stand in their way; because *FRAUD* is a *conclusion* of *LAW*, from facts: and therefore the *court*, and *not the jury*, are the *proper judges* "what facts do import fraud," and "what facts do not import fraud." And they denied that the letters, or any part of the facts given in evidence were at all *unfair*: at least, it could never be said, "that they supported a conclusion of fraud."

This case was argued on *Thursday*, 24th *January* last, by Mr. *Norton*, for the plaintiffs, who shewed cause against setting aside the ver-

dict and granting a new trial, upon payment of costs; and by Mr. *Winn, e contra*, for the defendants, who had moved for a new trial.

The court having taken time to consider it, Lord MANSFIELD now delivered their resolution.

This matter came before the court, upon a motion for a *new trial*, on the ground of a *misdirection* by the judge who tried the cause.

It was an action upon the case upon an *indebitatus assumpsit*, for monies had and received by the defendants, to the use of the plaintiffs, as assignees of the bankrupt. The defendants pleaded the general issue, and the cause was tried at *Lancaster* assises, before Mr. Justice Noel.

It was admitted at the trial, that *Satterthwaite*, the bankrupt, was a trader: and the debt of the petitioning creditor, the commission, and the assignment, were likewise all admitted.

The action was brought for monies arising from the sale of goods which had been consigned by the bankrupt to the defendants, as factors for him, and sold by them as such; which money was admitted to be in the defendants hands, and amounted to 5314l. 17s. 9½d.

It appeared that the defendants had paid several sums of money to *Satterthwaite's* use, upon bills drawn upon them by him, and otherwise.

The plaintiffs (the assignees under the commission) proved some *SECRET acts of bankruptcy* to have been committed by *Satterthwaite*, about *Christmas*, 1751; namely, his being denied to his creditors. On the other side, it was proved that he soon *appeared again publicly as usual*; and continued to do so, 'till about the month

of August following, (1752); but in August, 1752, he stopt payment, and thereupon the commission was taken out.

These secret acts of bankruptcy, committed at Christmas, 1751, over-reached the consignment of the goods, the sale of them, the receipt of the monies for which they were sold, and likewise the time when the defendants advanced the monies, to the use and order of the bankrupt.

It was insisted by the counsel for the defendants, that from the nature of the present action, an *indebitatus assumpsit*, the defendants, being FACTORS, ought to be allowed not only for their commission and all charges and expences, but also *whatever money they had paid on account OF BILLS drawn upon them by Satterthwaite*: and that the plaintiffs in this action could only recover the BALANCE of the general account.

The counsel for the plaintiffs admitted that the defendants were intitled to be allowed their commission and all charges and expences, as factors: but not the bills of exchange drawn by Satterthwaite, which they had paid subsequent to the act of bankruptcy.

This question was agreed to be reserved, (if it should be necessary to have recourse to it,) as a point for the future consideration and determination of the judge who tried the cause.

But the counsel for the plaintiffs insisted on a preliminary point; viz. "That the defendants were guilty of a FRAUD, in paying these bills of exchange drawn upon them by the bankrupt:" which preliminary point of FRAUD was sufficient to destroy any right that the defendants might otherwise claim (supposing the transaction had not been fraudulent,) to an allowance of the money paid in discharge of them; and,

and, consequently, to *preclude* them from *entering at all* into the *question* above-mentioned.

For if it should be admitted on the part of the plaintiffs, "that this action of *indebitatus assumpsit* affirmed the contract," yet if their payment of the bills was *fraudulent*, it would at once put an end to their claim of an allowance of the money as *fraudulently* paid. They granted, that, in case the defendants should appear *not* to have been guilty of any fraud, but to have paid the bills fairly and honestly, they would then have a right to enter into the point reserved (as above) for future consideration.

But they insisted that, upon supposition that in a *common* case, this sort of action would *confirm the contract*, so as to make the consignment, sale, and payment of the bills, to be considered as *before* any act of bankruptcy committed, and, consequently, that the defendants would be *intitled to retain what they had paid upon the bills*; (for every thing that could be alledged by the defendants, must, *pro hac vice*, be *admitted*, upon a previous bar to their going into the question;) yet the bar of FRAUD would *destroy* any demand they could have upon that account.

And the FRAUD which they *charged* upon the defendants was this, "That they were *PRIVY* to *Satterthwaite's* insolvency, at the *time* when they advanced the monies to *discharge his bills*."

Upon this *preliminary point only*, OF FRAUD, it was left to the jury: and, upon *this point only*, they found their verdict. Upon hearing all the evidence, they were of opinion, "That the transaction was *fraudulent* on the part of the defendants;" and they gave a verdict

dict for the plaintiffs, for the whole money, deducting only the commission due to the defendants, and the expences of the sale of the goods.

Though the *ground* of the verdict should be wrong, yet if it clearly appeared to us *now*, "that, upon the whole, *no injustice* had been done to the defendants;" or if it clearly appeared to us *now*, "that the plaintiffs, by *another form of action*, could recover all they have got by this verdict;" we think the court ought not to grant a new trial. But if *injustice* be done to the defendants, by the present verdict, and if it be *not* certain and clear "that the plaintiffs might have equal redress, and recover as much by *another form of action*," then we ought to grant a new trial.

Two points have been argued, and urged on the part of the plaintiffs.

First collateral point.

1st, That clearly the defendants were not to be allowed to retain for the bills: because, (1st,) They were not paid till *after* an act of bankruptcy; (2dly,) *This action* (of *indebitatus assumpsit*) only admits the sale of the goods, and nothing else, but the agency of the defendants in *that* single respect; and, (3dly,) If it admitted *every* thing, so as to put the assignees in the very condition the bankrupt would have been, had *he* brought this action, yet a *factor* has *no lien* for items of a *general account*, (his lien being confined to his *commission* and *expences* about the particular goods.)

* Vide 1 Burr. 494.

These points have not been at all considered in this action: and, therefore, it is enough if they are *doubtful*. They went off upon the preliminary question of the *fraud* being taken up and pursued, and were never afterwards taken

taken into any further consideration at the trial.

We are not clear that this action of *indebitatus assumpsit* does not affirm the power of the bankrupt and the contract, throughout the *whole* transaction. Where such an action is brought by assignees of a bankrupt's effects against a *vendee* of goods, it affirms the sale, and also the *payment to the bankrupt* of any part of the price. It is agreed here, that it admits the *consequence* of the defendants being factors, and allows a lien for *commission* and *expences*.

"That a *factor* has also a *lien* upon goods "consigned, (*whilst* they remain in his possession) for *ITEMS* of a *general* account with "his principal," has been solemnly * determined. However, the present case differs from the case of *Krutzer v. Wilcocks*, where it was so determined: for there, the factor *remained in possession of the goods*; but here the goods have been *sold*, and turned into *money*. In *such* a case, there never was a doubt but that *mutual items* of account might be set off; the demand and recovery can only be for the balance. Therefore it is impossible to say, that the question the defendants would have made upon this point, had they been permitted, *may* not be very material. And if it *might* have been material to their defence, they have a right to have it tried and considered.

* In the case of
Krutzer v. Wilcocks.

2dly, Another matter gone into at the trial, and urged by the counsel for the plaintiffs, was, "That, in an *action* of *TROVER*, the "plaintiffs might certainly recover the value "of the *GOODS*, *without* making any *allowance*."

Second collateral
point.

Mr.

Mr. *Winn* convinced me, that it would depend upon a variety of circumstances, (some of which he offered to lay before us by affidavit,) which were not gone into at the trial, because the counsel for the defendants were stopped and cut short, by the preliminary bar of the fraud, which was alone sufficient to invalidate their claims as upon a fair transaction.

I do not choose to say more particularly what may possibly assist the defendants in an action of trover, because I would not prejudice the matter: it is enough to say, "it does not sufficiently appear to us, that they could make *no* defence to an action of trover."

Principal point.

This makes it necessary to examine the *GROUND of the verdict*, which proceeded from the direction given.

I will admit, "that the evidence proved the fact, and every conclusion deducible from it:" but I cannot think that the fact so proved, or conclusion so drawn, amounts to that offence which the law calls *FRAUD*, to avoid the debt. And in examining this matter, we must remember, that, *pro hac vice*, the whole transaction is admitted to be *before* any act of bankruptcy.

Mr. *Norton* rightly said, "that *fraud* is sometimes mere matter of fact; and sometimes, the conclusion of law from facts."

So is high treason. Levying war is mere matter of fact: compassing the death of the king, is a legal conclusion from facts. So it is almost as to every other offence.

Fraud often is a mere fact; as when it depends (as on a policy of insurance, for instance,) upon what the party said or did; or it may be, and often is, a question of law.

Suppose

Suppose a creditor, *knowing* a trader likely to break, *conceals* it from the knowledge of other creditors, 'till he gets, even by threats of legal process, payment of his debt *before* any direct act of bankruptcy, and the assignees should insist this was a fraud, and that he should refund: this is a matter of *law*; and the *law* would say "that this was *not* fraudulent."

Suppose a man, *bonâ fide*, lends money to a trader upon a *mortgage*, after an act of bankruptcy *without* notice, and *then knowing* of the commission of bankrupt and assignment, gets in an old term, even for little or no consideration, and the assignees bring an ejectment, and it becomes a question, "whether this be a fraud, or not;" this is a matter of *law*: and the law will say "it is *no* fraud;" for the mortgagee had a right to do this.

The evidence of fraud in *this* case, as stated by the report, are the following letters:—The first is dated *Bristol*, 5th *May*, 1752, signed "*Devonshire and Reeves*," and directed to *William Satterthwaite*.

"We wish you had been open, and told us *in time* how your affairs stood.—It appears to us very evidently, you have risked your reputation and credit on the faith of those S. Do but consider where you must have been in point of reputation, had we done otherwise than we did.—It is now over; and we will not do any thing that should lessen your credit—therefore ship not an ounce of goods more, 'till your affairs are settled."

The next letter is dated *Bristol*, 15th *May*, 1752, signed "*Devonshire and Reeves*," and directed to *William Satterthwaite*, merchant in *Bristol*,

Bristol, and contains the following passage:—

“ We cannot help being uneasy to think you
 “ have drawn on us again for 120*l.* Really
 “ you will make us let your bills go *back*
 “ *protested*, in spite of our inclinations. We
 “ will pay this; but take notice—*don't draw*
 “ *another*: we friendly hint it.”

The next letter is dated 25th *June*, signed and directed as above, and is thus:—“ *William Satterthwaite*, esteemed friend—We
 “ really *fear* these proceedings will *greatly hurt*
 “ *your credit* in the eyes of every judicious
 “ person: it is very natural to think that will
 “ be the consequence. For our part, we
 “ would make a thousand shifts, rather than
 “ trifle with our reputation, as you do with
 “ your's—it's a matter well worth your serious consideration.

“ P. S. Inclosed we return you *Liebenrood's*
 “ draft 150*l.* which, with one shilling postage, place to our credit. This is such a
 “ thing we never did before, nor ever will
 “ again.”

The next letter is dated 27th *June*, 1752, signed as before, and directed to *William Satterthwaite*. After referring to the last, it goes on thus—“ In this last letter, thee mentioned
 “ nothing of remitting for *Liebenrood's* bill,
 “ which thee ordered us to send for from *London*
 “ four days before due, (which we did,
 “ and returned thee in our last,) though thee
 “ promised us faithfully to remit for the same,
 “ last sixth day was a week, and having had
 “ fundry letters that take no notice thereabout,
 “ we cannot help thinking and saying that
 “ thee *trifles with thy creditors and us*. We
 “ are so much in want of money as *thee canst*
 “ *possibly be*; and had we thought thee wouldst
 have

“ have treated us in this manner, we would
 “ not have advanced one quarter of the sum,
 “ to be allowed 10 l. *per cent.* The disap-
 “ pointment to us gives more uneasiness than
 “ all the profits of a year’s trade will do us.”

The next letter is dated 14th *July*, the same year, and signed as before; and is as follows:—

“ *William Satterthwaite*, Esteemed Friend, So
 “ much for your affairs in and under our care,
 “ which shall be managed with all care and
 “ frugality.

“ But what next we say, *appears to us in a*
 “ *very odd light*—For *Edward Wilcox* has been
 “ with us, and says you have *made over our*
 “ *goods on the Sarah and Martha*. If true,
 “ gives us *such ideas that we dare not put pen*
 “ *to paper to say our sentiments*. If you send
 “ us any more bills—if ever we do return a
 “ bill, we *will return your’s*.”

The next letter is the 28th *July*, the same year, signed as before, and is as follows:—

“ *William Satterthwaite*, — The *Sarah* and
 “ *Martha*, your $\frac{3}{4}$ ths. The *Carolina*, how
 “ much? Tell us: for *you must secure us, by*
 “ *a bill of sale of each*,—that is your parts—
 “ unless you send here some *security*.—Say,
 “ your father *Moss*—join in a bond, or some
 “ good man. Claimants will call upon us,
 “ for their proportions of cargoes we have
 “ sold; as *Touchetts* did of the rice. We are
 “ willing to stand by you as far as we can with
 “ prudence: but *an undoubted counter-security*
 “ *we must have—we dread the consequences of*
 “ *these repeated strokes—we very much sus-*
 “ *pect, you have not the money—we must have*
 “ *your affairs cleared up*. Whatever you are, we
 “ *are almost broken-hearted, to see how you are*
 “ *going on, and have of late*. And what will be
 “ the

" the consequence, if you are worth 3000l.?

" We know, and have seen, the consequence
" elsewhere."

Some vague suspicions beside, have been mentioned at the bar, by the counsel for the plaintiffs: as, that they were all of them *Quakers*, and endeavouring to play into each others hands, to the prejudice of *Satterthwaite's* other creditors; that *Satterthwaite* had broke before; that all the bills were after *May*; (which the other side denies.)

But as I proceed upon *allowing* the evidence to prove the conclusions contended for, it is only necessary to examine what those *conclusions* are. The report says, " that a false credit was given the bankrupt;" *i. e.* he would have broke openly, unless they had lent him money. The counsel for the plaintiff say, the defendants lent him money to keep him from failing, 'till his ships and goods might come home, consigned to themselves, or even to the bankrupt's own hands: whereas, if a commission had issued *before* that time, the *assignees* would have had them.

It was left to the jury, that if they believed, from the evidence, that the defendants *knew*, or *understood*, the bankrupt's circumstances to be *insolvent* at the time they paid his bills, they might find against him, *upon the ground of FRAUD*. And they found in the affirmative.

Had the question turned upon the validity of a payment made *after* an act of bankruptcy committed, within the act of 19 G. II. c. 32.* (which was one of the points made at the trial,) the direction would have been quite agreeable to the terms of that act. But, as the question was, " Whether, supposing the whole
" transaction before any act of bankruptcy
" com-

* Vide §. 1.

" committed, the defendants were to be excluded from claiming satisfaction for the money they had advanced upon *Satterthwaite's* bills; by reason of their fraud in advancing it;"—we are all of opinion, " that the *direction was a MISTAKE.*"

It is no *fraud* for a factor, *knowing* the circumstances of his principal to be desperate, and *believing* that he must break unless he can procure credit, to *advance money* upon his bills, *to save him from an immediate failure.* On the contrary, it is an honourable, friendly, and generous act. No *prejudice* can arise but to the lender himself. He may lose the whole, or the greatest part of the money so advanced: but the *principal's* estate, if he breaks, is by so much a *gainer*, or *some particular creditors*, to whom this money has been *paid*, are *gainers*. If, by this assistance, the principal has the good luck to *stand his ground*, he and *all* his creditors are *benefitted*: but *none* of his creditors can *suffer* by the advancement of money to their debtor. Many beneficial instances of this kind have saved the most considerable houses from ruin.

If the factor trusts that effects of his principal will come over from abroad, consigned to him, by which means he may *acquire a lien* upon them for his reimbursement, the factor's conduct is a little more prudent; but still it is free from all colour of *fraud*. It is the *usual method* of dealing between principals and factors in *good credit*; the latter advances money upon the faith of consignments: but when a factor, knowing his principal to be in *great distress*, and in *immediate danger of failing*, advances money upon the *faith* " that

"effects beyond sea will come over consigned
"to him," he acts *meritoriously*.

The richest man in trade may be ruined, while his effects are abroad, and not in his own power, to answer immediate demands upon him, (which was the case of the *Woodwards*, who could not save themselves from failing, though they had sufficient to pay 30s. in the pound.) But the factor may actually save him by this assistance, 'till they come home: and yet the factor himself runs a great risque, and trusts to a *precarious* security. For the goods may in fact be consigned originally to *another*; or the consignment to him may be *countermanded*; they may be *sold*; they may be *mortgaged*, or *burnt*, or *lost*, and never come into his possession so as to give him any lien: and it appears by the letters that have been read, that, in this very case, *Satterthwaite* unworthily made over to other persons part of the goods to which the defendants had trusted for their security.

* Sect. 11th.

A *mortgage* of ships abroad, or of cargoes upon the high seas, by a trader, to any body, is *good*, notwithstanding the clause in 21 *Jac. I. c. 19.* * though possession has not been actually delivered: for a bill of sale is all the possession that can be delivered, 'till the ship comes home.

There scarce happens a bankruptcy, in which it does not appear that a fictitious credit has been acquired by drawing and re-drawing bills of exchange, and by accepting and indorsing promissory notes: yet there never was a doubt, but that the persons lending their names, by which they render themselves at last liable, may come in as creditors. The case of a man who has *actually paid his money*

to

to support the credit of another, is infinitely stronger than that of lending a name only, without advancing any money at all.

There cannot be a greater paradox, than that a man should be guilty of a *fraud*, in lending his money with *no other prospect* but the *chance* of being repaid it.

A notion, "that lending money to traders, *Of lending money to traders known to be in dubious circumstances.*" knowing them to be in dubious, tottering, "or distressed circumstances, upon mortgages or liens, is fraudulent; and, consequently, the contract void in case a bankruptcy ensues;" would throw all mercantile dealing into inextricable confusion. Men lend their money to traders upon mortgages or consignments of goods, *because* they suspect their circumstances, and will not run the risk of their general credit.

Though we have all been clearly of opinion, that no conclusion attempted to be drawn from the evidence in this case, allowing it to be true, amounted, in point of law, to the offence of *fraud*, and a forfeiture of the debt on *that* account; yet I have so great a regard for the authority of my brother *Noel*, (whose knowledge and experience is as great, and his opinion of as much weight, as any man's, both in courts of law and equity,) that I was desirous to talk the matter fully over with him; which I have done.

He says, the point upon which the defendants case is now put, and which was reserved for his opinion if it should be necessary, was not explained, or understood at the trial, as it is now: and the question of fraud was so intangled, by not distinguishing this case from that of a factor having goods in his possession consigned to him before an act of bank-

bankruptcy; and, *after knowledge* of an act of bankruptcy, advancing money to the bankrupt, with a view of covering the effects, and playing them into his own hands, in opposition to the bankrupt's assignees.

But in this case, where the factors did not know of the act of bankruptcy, he is now fully convinced that the facts did *not* amount to *fraud*, and that the jury should have been so told; and concurs in opinion, that there should be a *new trial*.

* In Chancery,
M. 1749.

If we did not grant it, the precedent of * *Villain v. Hyde* must be followed; where a bill in Chancery was brought by the defendant at law in an action upon an *indebitatus assumpsit*, because allowances, which ought in justice to have been made to him at the trial, were not made. Lord *Hardwicke* was, in that case, under great difficulties how to proceed, upon such a ground, to give relief in equity: but the strong justice of the case prevailed upon him to shew such a disposition, as induced the assignees to consent to the allowance, and make a satisfaction agreeable to the real justice of the case.

We are all of opinion that the rule be made absolute for a *NEW TRIAL*: but the new trial must be upon *payment* of costs.

RULE made *ABSOLUTE* for a *new trial*, upon payment of costs.

N. B. The assignees acquiesced; and never tried the matter again in this action, nor brought any other.

Friday, 20 Nov.
1761. Wright,
ex dismiss. Wil-
liam Clymer v.
Littler et al'.
M. 2 Geo. III.
B. R. 3 Burr.
1244.

This was an ejectment for certain copyhold lands within the manor of *Barnes*, in the county of *Surry*; in which manor there is a custom of *Burrough-English*.

The

The lessor of the plaintiff, *William Clymer*, made out his title, under a regular and undisputed will of his grandfather, *John Clymer*, dated 17th *February*, 1743, and executed in the presence of three witnesses, disposing of his freehold, as well as of this copyhold estate, to the lessor of the plaintiff in fee; the testator, *John Clymer*, having previously surrendered the copyhold to the use of his will.

The title of the defendants (who were purchasers under another *William Clymer*, second and youngest son of *John*, and uncle to *William*, the lessor of the plaintiff,) depended upon another *subsequent* will (or instrument which they called a will) made by the said *John*, as they alledged, on the 20th of *September*, 1745; which, they contended, was at least a REVOCATION of the former will in 1743. And if it be only a REVOCATION of the former will, then *William*, the youngest son of *John*, must inherit as heir in *Burrough-English*.

This will or instrument of 1745, (which was not under seal,) was all written by one *William Medlicott*, who was son-in-law to the said *John Clymer*, (having married his only daughter *Amev*.)

It was also indorsed on the back, in the same hand-writing of the said *William Medlicott*, in these words—"The COVENANT and AGREEMENT of *John Clymer*:" and it was witnessed by the said *William Medlicott*, and one *Elizabeth Mitchell*.

The body of it was in these words: "Know all men by these presents, That I *John Clymer*, of *Barnes*, in the county of *Surry*, Gent. have this day COVENANTED and AGREED in the manner and form following, that is to say: For natural love and

Ejectment, Question upon a forged will or instrument, and a genuine will of prior date; with another question, supposing the latter instrument not forged, if it was a revocation of the first will; also another question, as to the legality and admissibility of the evidence offered and received to impeach the latter instrument. The judge directed the jury to find for the plaintiff upon the prior will, which they did. Motion for new trial, on the ground of misdirection, int. al. new trial refused.

" affection which I have and bear to my son,
 " and daughter, and grandson, herein after
 " named, I do *make, constitute, and appoint*
 " the several estates and sums of money fol-
 " lowing, after the decease of myself and
 " *Ame*y my wife, to come to and be given
 " to them. But first of all, my estate called
 " *Barnes* and *Hopton*, to my wife for her life;
 " and, after her decease, all that eighteen
 " pounds a year, to my son *William Clymer*,
 " for his life; and, after his decease, to *Wil-*
 " *liam Clymer*, my grandson. And as to all
 " those COPYHOLD messuages, lands and re-
 " nements at *Barnes*, in the county of *Surry*,
 " (which is the estate in question) " to my
 " daughter *AMEY*, *the wife of William Med-*
 " *licott, her heirs and assigns for ever*; to take
 " and hold the same after the immediate
 " death of myself and said wife, and not be-
 " fore. Dated 20 September, 1745. *John*
 " *Clymer*. Witness, *Elizabeth Mitchell—Wil-*
 " *liam Medlicott*.

It happened, in fact, that this *Ame*y *Med-*
licott, daughter of *John Clymer*, and wife of
 this *William Medlicott*, died *before* her father.

In order to be better understood, I will
 give a short pedigree of the family, and spe-
 cify the particular times of their respective
 deaths.

Old

Old John Clymer, the testator, } { Amy, wife of old
seised in fee, died in April 1746. } John Clymer, died
He had issue by his wife Amy, } in his life-time,
two sons and one daughter. } viz. 7 Feb. 1745.

John Clymer, William Clymer, Amy Clymer,
eldest son, died second son, died married Wil-
in his father's November 1747, liam Medlicott:
life-time, leav- a widower, with- she died in her
ing issue a son out issue. father's life-
and a daughter. time, viz. in
January 1745,
without issue.

William Clymer, Amy Clymer,
lesser of the plaintiff. died an infant.

Upon the death of old *John Clymer*, in 1746,
his second son, *William Clymer*, was admitted
to this copyhold estate (the premises in ques-
tion) as heir in *Burrough-English*: the above
mentioned will of old *John Clymer*, in 1743,
being then UNKNOWN to every body except
the above named *William Medlicott*, who had
it in his possession, but secreted it.

This *William*, youngest son of *John*, enjoy-
ed the estate until 1751; and afterwards sold
it to one *Penley*. *Penley* was admitted, and
aliened it to one *Mitchell*, who was admitted
in 1751; and afterwards sold part of it to *Lit-
tler*, one of the present defendants, who was
admitted to that part: the other part descend-
ed to *Penley's* heir, who was admitted thereto,
and then sold it to *Pelham*, another of the pre-
sent defendants, who was also admitted in due
manner.

During the time of all these transactions,
the lessor of the plaintiff was at first a *minor*,
then at sea, always poor, and remained igno-
rant of the will in 1743, 'till the death of
William Medlicott, who produced it when dy-
ing, and directed it to be delivered to the
lessor of the plaintiff.

William Medicott died in *May 1747*. He had the custody of *both* wills, 'till a few weeks before his death. The latter will was found among his papers. The former was delivered by the said *William Medicott* to one *Edwards*, about three weeks before his death; and it was, about three months after, delivered to *William Clymer*, the lessor of the plaintiff, who was then about two years under age, but proved it in 1751.

After this discovery, the lessor of the plaintiff did not bring this ejectment 'till after an acquiescence of fourteen or fifteen years from his uncle's first admission to it, upon old *John's* death, or at least, without the nephew's setting up any claim within that time; during which his uncle *William*, or the purchasers under him, had been in quiet possession.

At the trial, the lessor of the plaintiff produced and proved the will of 1743, under which he was devisee of this estate in fee.

To encounter this evidence, the defendants produced this will, or instrument, in 1745; and both the witnesses to it (*Elizabeth Mitchell* and *William Medicott*) being dead, they proved their hand-writings, and also the hand-writing of old *John Clymer*, in the common and ordinary form.

Whereupon the plaintiff's counsel insisted, that this will or instrument was, in the first place, an absolute FORGERY; and, in the next place, that, in point of law, it could NOT operate as a REVOCATION of the will in 1743.

And they called *Mary Victor*, sister to the said *William Medicott*, who was one of the subscribing witnesses to the will, or instrument, of 1745: which *Mary Victor* swore,

"That

"That whilst she was attending her said brother *William Medicott*, in his last illness, and about three weeks before his death, he pulled out of his bosom the will of 1743, and said 'it was the TRUE will of *John Clymer*;' and then delivered it to her, with directions to deliver it over to *William Clymer*, the lessor of the plaintiff, or to Mr. *Faulkner*." And she added, "that one *Edwards* was present at the time."

This *Edwards* (who had been already called on the part of the defendants, to prove the hand-writing of *Elizabeth Mitchell*, one of the witnesses to the will or instrument of 1745,) on being cross-examined on the part of the plaintiff, confirmed *Mary Victor*'s evidence, "That *Medicott* did pull the will of 1743 out of his bosom, and gave it to her with such directions as she had deposed."

Upon *Mary Victor*'s cross-examination by the counsel for the defendants, she not only persisted in what she had before deposed, but also added, that at the same time that *William Medicott* produced the will of 1743, as the true WILL of old *John Clymer*, HE ACKNOWLEDGED and DECLARED to her, "that the said will or instrument of 1745, was FORGED BY HIMSELF."

No objection was made to this evidence, by the counsel for the defendants, at the trial.

The judge and jury (a special one) perused and examined the two instruments of 1743, and 1745, and their different signatures;—and took notice of the circumstances of the latter, being all of the hand-writing of this *William Medicott* himself; and disposing of a fee to *Medicott*'s own wife: and upon the whole, they were all of opinion "that it was

"a FORGERY." And the judge *directed* the jury to find for the plaintiff: which they did.

On *Tuesday*, 10th *November*, 1761, Mr. *Norton* moved, on behalf of the defendants, for a *new trial*; upon the foot of a *mis-direction* by the judge who tried the cause, upon a point of *evidence*: and a rule was made to shew cause why the verdict should not be set aside, and a new trial granted.

* Sir J. Burrows says, I have already endeavoured to throw the whole together, as clearly as I was able.

This cause coming on to be argued yesterday, (19th *November*, 1761,) Mr. Justice *WILMOT* reported the * evidence from Lord Chief Justice *Willes*, who tried the cause, and who was satisfied with the evidence; and reported that no *objection was made at the trial*, to the evidence given by this witness, *Mary Victor*.

Mr. Justice *Wilmot* having made his report, and several *additional circumstances, not mentioned in the report*, having been agreed by the counsel on both sides,

Mr. *Norton* proceeded. He objected to the admission of *this evidence*, as being only *HEAR-SAY* evidence. What *Medlicott* said, ought not to be admitted or regarded: for it was not said *upon oath*, nor was there any opportunity of *cross-examining* him.

Indeed this evidence would have been of little or no weight, even if he had given such a testimony *HIMSELF*; after having himself solemnly *attested* this will, as a witness to it.

This pretended declaration was made near fifteen years ago (for he died in 1747:) and yet the ejectment was not brought till 1761. This sort of evidence shall not overturn a title confirmed by so many years possession.

Besides, we are a *purchaser* for a *valuable* consideration, under the heir at law; to whose title no objection was ever made.

Mr. *Eliab Harvey*, for the plaintiff, admitted the possession to have gone in the course of descent in *Burrough-English*; but observed that the granting new trials is not so necessary in *ejectment* as it may be in other cases; because it is easy to bring another *ejectment*.

As to the length of time they have been in possession—*William*, the grand-son (the lessor of the plaintiff) was poor, a minor, at sea, and ignorant of the will in 1743.

Our title stood upon an *unexceptionable will*. Their's is rather a deed of covenants: but they insisted upon it as a *testamentary act*, and a revocation.

Their own witness, *Edwards*, proved, in the course of giving his evidence, "that *Medlicott* did produce out of his bosom, the will of 1743, and delivered it to *Mary Victor*, to be given to the lessor of the plaintiff, or to Mr. *Faulkner*."

We called this *Mary Victor*, not to give evidence of the forgery, but to impeach the credit of their evidence *William Medlicott*.

If *Medlicott* had been living, he must have been called to prove the will. And if he had owned "that he forged it," it could not have been established: or if he had proved the execution of it, we should have been at liberty to discredit his personal evidence, by shewing "that he had himself owned it be a forgery." And surely, we may give the same evidence after he is dead, in contradiction to the proof made by other persons of his hand-writing.

In this second instrument of 1745, there is a disposition to "*Medlicott's* wife, in fee:" she died before the testator. But it was no will, no *testamentary act*, nor even a deed.

This

This is the verdict of a *special* jury. And Lord Chief Justice *Willes* compared the papers, and declared "that it bore the *appearance* of "a forgery." The jury thought so too. And their verdict ought to stand.

LORD MANSFIELD ordered both the wills or instruments to be produced here to-day: to which time it was adjourned.

And they being now, accordingly, produced, Mr. *Norton*, for the defendants, proceeded, to the following effect. We could have proved this will, even *without calling Medlicott*, if both the witnesses had been living: or if *Medlicott* himself had been alive and been called, he might have explained the occasion of his saying such words to such a person, and at such a time.

The *consequence* of admitting such evidence as this is, would be fatal: and no purchaser under a will could be safe.

Here were many *notorious changes* of the property; and an absolute *acquiescence* all the time, by the lessor of the plaintiff.

The wills are now both of them before the court. That of 1745, enures either as a *will of copyhold land*, or as a good writing, to *appoint the uses* of a surrender of copyhold land; or at least, as a *revocation* of the will made in 1743.

First, It is a good will of *copyhold* lands. *Copyhold* lands are *not within* the statute of frauds: and *no witnesses at all* are necessary to such a will. It is a good will under the statute of *Hen. VIII.* * that statute only requires "that it be a will *in writing*."

I agree that here is no disposition of the *personal* estate, or any appointment of an *executor*. But still it is a good will of *copyhold* land: for neither of those are necessary in a will of copyhold

* 32 H. VIII.
c. 1.

hold land. It gives an estate for life to his wife, with remainder to *William Clymer*, under whom we claim. And the ecclesiastical court have received it, and suffered it to be proved as a will.

Secondly, it is a *good instrument to appoint the uses of a surrender.*

Any writing is sufficient for *this* purpose: it needed not any attestation.

Thirdly, At least, it will operate as a *revocation.*

Revocations are favoured, both in law and equity. There are many methods of revocation: a will may be revoked by *mere operation of law*, without the intention of the party. A feoffment without livery, a bargain and sale, without inrolment, a grant, without attornment, are sufficient to do it.

But by his *own act*, a man may, by writing, revoke one will, without making another.

Before the statute of frauds, he might have revoked it *verbally*, by mere *parol* only.

Any act *inconsistent* with the will, though *ineffectual* to the purpose it was *intended* for, yet being done by the maker of the will, is a *revocation*; because it shews his intention to revoke the disposition he had before made of his estate.

This writing fully shews the *animus revocandi*. Which alone is sufficient. It is indeed a very inaccurate instrument: but it is *in writing*; and he says * “*I have agreed that my*” * *Vide ante.* “*estate shall go so and so.*” And this will or writing shews his intention of a *total* revocation of the former: for, by this, he disposes of his land to a very different purpose, from the former disposition of it, by the will of 1743.

Both wills were read in court.

Mr.

Mr. *Harvey* and Mr. *Lee* were for the lessor of the plaintiff, *William Clymer*, the grandson.

They observed that Mr. *Norton's* objection was confined to the evidence of *Mary Victor*, sister to *William Medlicott*, one of the witnesses to the will of 1745: and they observed too, that her evidence was *corroborated* by the evidence of Mr. *Edwards*, one of their own witnesses.

But it was to be further observed; they said, that the verdict was *not founded* on this evidence ONLY. For the special jury actually *saw* and *deliberately perused* the will or instrument of 1745, and upon such *view, inspection, and examination*, and upon all the circumstances of the disposition, they judged it to be a forgery. — Besides, *no objection* was taken to this evidence, *at the trial*. They might have objected to it then, or demurred to it.

As to *acquiescence*—The lessor of the plaintiff was but seventeen years of age, when his grand-father died; was always poor; and was at sea, the most part of his time.

But as to the EVIDENCE itself—It was *strictly* and *legally admissible*. It was not given in order to *prove the forgery*; but to DISCREDIT their evidence, arising from the proof of *Medlicott's* hand; *Medlicott* must have been called, *if living*; and would have overturned the will or writing of 1745, by giving this evidence of what *Mary Victor* swears he owned to her. The present proof is only “that he was a “subscribing witness.” And this evidence might be and was proper to be given, to take off the force of such his attestation. As to the *legal operation* of this will or instrument of 1745;—

First,

First, It is *no good will* of LAND of any kind; there is *no animus testandi*; no publication; no mark of a will.

Secondly, Neither can it be a sufficient appointment of the uses of a surrender made to the use of a WILL; when it is *not a will* at all, nor even a testamentary appointment.

Thirdly, Nor can it operate as a REVOCATION of the former will. Here are no words of revocation; no declaration of an inclination to it: *no such intention* appears. Revocations are *not favoured* now: the statute of * 29 C. 2. c. 3. frauds settles the point, in what manner they shall be made. Feoffments to uses, bargains, and sales inrolled, and grants operate by relation to the life-time of the testator: and a feoffment without livery, a bargain and sale without inrolment, or a grant without attornment, are only incomplete. But a *mere covenant* "to make a feoffment in fee," without more, is no revocation of a will: as was determined in the case of *Montagu v. Jeoffereys*, in *Moore*, 429. and 1 *Ro. Abr.* 615. pl. 3.

Little or nothing is to be found about revocations of wills of *copyhold* lands. But it has never been determined, "that a will of *copyhold* is *not* within the *revoking* clause of "the statute of frauds."

A will of *copyhold* lands cannot *now* be revoked by *parol*: it must be by some *other will* declaring the same. In the case of *Eggleston et al. v. Speke*, 3 *Mod.* 258. the second will did not operate as a revocation of the former; because it was not a good will in all particulars, and there was *no such declared* intention. *Cartwright* 79. S. C.

But a *mere covenant* and agreement will not revoke a will. 1 *Ro. Abr.* 615. pl. 3. Title *Devise*.

Devise. Letter P. And yet that was a covenant in pursuance of a marriage : which makes it a very strong case.

The words "*constitute and appoint*," are not *testamentary words* : nor is there any *publication* of this writing. It is *not under seal* : which it ought to be, in order to revoke what is under seal : therefore, as an *appointment*, it cannot revoke the former will. It ought also to have been done in the presence of *three* witnesses, by the statute of frauds, the twenty-second section takes care of the *revocation* even of wills of *PERSONAL* estates ; though it does not meddle with the *making* them.

And this is a ground for a presumption, " that the legislature considered *copyhold* wills " to be within the provision of the statute, as " to the *revocation* of *THEM* too."

The revocation in the present instance, must be extended to the will of the freehold, as well as of the copyhold, if it operates at all : it cannot operate as a revocation of *part* of the former will, and *not* as a revocation of *another* part. It must be an intention to revoke the *whole* : it must intend to *give to another*, as well as to *take from* the former. In the case of *Onions v. Tyrer*, 1 *Williams*, 345. Lord *Cowper* argues upon this principle, " that if " the second devisee *took* nothing, the first " devisee could *lose* nothing. But in this case now before the court, nothing is given to any other person. This *covenant* is no revocation of a will. 2 *Peere Williams*, 623. *Catter v. Layer*. And it cannot take effect as a testamentary revocation. The defendants cannot be purchasers for a valuable consideration, under a public notoriety ; and *without notice* of our claim. All the purchasers were *under notice* of a will :

a will: and the defendants consulted counsel upon the validity of it.

This evidence is *admissible*; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of *murder*. So that it ought not to be called " *MERE hearsay evidence*."

But their objection comes *too late*; as it was not taken upon the trial: they even *cross-examined* the witness. So is *Lucas's Rep.* 202, 203. *H. 12 Ann. B. R. Queen v. Corporation of Helston*.—"If counsel do not, at the trial, in-
 "sist upon an objection, there ought to be no
 "new trial." *H. 2 Geo. II, Fitzgibb.* 40.
 Anonymous.

Vide post IX.
 (12.) (a.)

Mr. *Lee* moved for a new trial, because his client had made a mistake in point of evidence: and it was denied; because "*vigilantibus non dormientibus jura subserviunt*."

This express evidence of the direct *forgery* came out upon Mr. *Knowler's* cross-examination of our witness (this *Mary Victor*;) not upon our examination of her.

Mr. *Norton*, in reply.—This will of 1745, says, "*I appoint my lands to come to, and be given to, &c.*" It cannot be a covenant to stand seised: there is *no seal*, *no covenantee*; and besides, it is *copyhold*; of which there cannot be a covenant to stand seised. It must operate as a *revocation*.

Wills of *copyholds* are not within the statute of frauds; either as to the *making* or as to the *revocation* of them. They stand just as they did: the *revoking* clause can never extend to them, when the *enacting* clause does not.

As to the case of *Eggleston et al. v. Speke*, 3 Mod. 258.—the nature of the estate is different from this. This is a revocation of the will *in toto*, *quoad* the copyhold land.

A will may be good as to copyhold, though bad as to freehold: therefore so also may a revocation be.

An instrument may operate as a revocation; though it be void as to its professed end and intention: as, for instance, a will devising land to a papist.

As to the case in 1 *Peere Williams*, 345. there was *no intention* to revoke the will, and let in the heir at law.

But in the present case, the two acts of the testator are *inconsistent*. This is *not a covenant to do the thing*; but *actually doing it*: it does not rest in futuro.

Nothing passes by a feoffment, without livery; or by a bargain and sale, without enrolment; or by a grant without attornment: and therefore in such case there can be no reference backwards.

LORD MANSFIELD.—The defendants came to the trial, apprised of the plaintiff's title, and prepared to encounter it.

There is no doubt as to the will of 1743; which is the plaintiff's title. The only answer to it, which the defendants now alledge, is, "that the instrument of 1745 has revoked it." And they do not suggest that they can give any new evidence in support of that instrument, or the point of revocation. The jury have found for the plaintiff: consequently, "that the will of 1743 was *not* revoked." Lord Chief Justice *Willes* is satisfied with the verdict. This motion, therefore, and the argument in support of it, as there is no pre-
tence

tence that the defendants can mend their case upon a new trial, is in the nature of an appeal from his opinion.

There are three grounds, any *one* of which, if made out, is sufficient to support this verdict. If the instrument of 1745 was *forged*, if it was *obtained by fraud and imposition*, though not forged; or, though duly and fairly executed, if it be no revocation.

As to the first ground, the defendants complain, that the Chief Justice mis-directed the jury, by leaving to them as evidence, the declaration of *Medlicott* "that he forged it."

Answer. It came out upon their *own* examination. They made no objection to it at the trial, and it certainly was a circumstance *proper* for the jury to consider. The competence of evidence depends upon the circumstances under which it is given.

The will of 1743 is set up after fifteen years. It was necessary to shew how it was secreted, and how discovered. The declaration of *Medlicott* in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1745 was equally in his custody and secreted. The account he gave of it in his last moments is equally proper, even though it had been upon an examination by the plaintiff, (especially as it was all written and witnessed by him, and gave the premises in question to his wife,) as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice, and ease his conscience; I am of opinion "the evidence was proper to be left to the jury."

But, independent of this declaration, *forgery* or *fraud* was *apparent*. *Medlicott* appears to have been a bad man. It is all written by him, and gives the fee to his wife, in prejudice of *John Clymer's* male issue. It is worded as an irrevocable settlement; without cause or consideration. *Medlicott* never dared to produce it; and chose rather to conceal the will of 1743, that the younger son might be admitted and possess the premises.

But lastly, This paper is *no revocation*. It is no will: and therefore cannot direct the uses of the surrender. It is no conveyance. It is no agreement with any body. It does not purport having been delivered to or for the use of any body. There is no proof that it was out of the custody of *John Clymer* before his death. It ought not to have been out of his custody; because it is voluntary, and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying, "that he *intended* "to make a will or surrender to the use of "his daughter, in fee" and *did* neither. An *INTENTION* to revoke by a future act which a man cannot be compelled to perform, is no revocation, *till* the act is *done*. All the cases are so: and the reason is evident.

It is to no purpose to grant a new trial; because I am satisfied that the verdict is, in every light, agreeable to the true justice of the case.

Was it a measuring cast, or if the defendant had been *surprised* by the plaintiff's title, I should have thought otherwise.

The defendants are purchasers from the heir of a copyholder duly admitted. There has been a possession above fifteen years. The title set up by the plaintiff is a will *concealed*.

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But, be these favourable circumstances as they may, the trial had is satisfactory beyond a doubt: and the defendants cannot mend their case. Therefore it would be vain and vexatious to grant a new trial.

The three other judges declared their entire concurrence: but declined expatiating upon it, or entering into particulars, as Lord Mansfield had so fully gone through it.

Per cur. The rule must be DISCHARGED.

This was an action on the statute of 2 G. II. c. 24. §. 7. "For the more effectual preventing bribery and corruption, in the election of members to serve in parliament."

The declaration contained five counts:—

First, That the defendant *corrupted* one Moore to vote for Lord Villiers and Sir Robert Burdett, by giving him five pounds five shillings;—

Secondly, A corrupt agreement to give Moore five pounds five shillings;—*Thirdly*, A corrupt agreement to lend him five pounds five shillings upon a promissory note;—*Fourthly*, A corrupt agreement to deliver the note to Moore on voting;

Fifthly, For giving the note and counter-note hereafter mentioned. A verdict was found for the plaintiff, and entered on the first count.

Mr. Serjeant Hewitt, on behalf of the plaintiff, shewed cause against setting aside the verdict; which had been moved for, on the part of the defendant.

Mr. Caldecott, on behalf the defendant, had objected, when he made that motion,

First, That the man *did not in fact* vote for the persons he promised to vote for; but, on the contrary, voted for their opponents: and therefore the defendant, as he did not by any corrupt agreement, *procure Moore* to vote for

X 3

them,

Sulton v. Norton. M. 2 G. III. B. R. 3 Burr.

1235. Action upon the Bribery Act. Verdict for plaintiff. Motion for a new trial.

1. Obj. That the man bribed did not vote for the party on whose behalf he was bribed, and therefore plaintiff ought not to have recovered.

2. Obj. That the verdict ought not to have been upon the first count, which was for a gift, i. e. for giving money. That there being counter notes, it was not a gift, but a loan. New trial refused.

them, cannot be said to have *corrupted* him to do so.

Secondly, That the verdict ought not to have been taken on the first count, which was for *giving* him the money.

To the *first* objection, the case of *Busb v. Rawlins*, in *B. R. P. & Tr.* 29 *G. II.* was said, by the Serjeant, to be a full answer, being in point.

And in answer to the *second* objection, he alledged, that the evidence given very sufficiently supported the taking the verdict on the first count; and for the truth of his allegation, appealed to Mr. Justice *Foster*, who tried the cause.

Mr. Justice *FOSTER* reported the evidence to have been, " That the defendant gave *Moore* five guineas, to vote for Lord *Villiers* and Sir *Robert Burdett*; that *Moore* gave him a note for it; and the defendant gave him a counter-note, obliging himself to give up the former note, when the condition should be performed."

Mr. *Caldecott* and Mr. *Thurlow*, for the defendant, thereupon observed, that the act of parliament says, " If any person, &c. shall take any money, &c. by way of gift, loan, or other device:" and though the plaintiff has laid this several ways, he has taken a verdict as upon a GIFT; whereas it appears in fact, NOT to have been a GIFT, but a LOAN, or other device.

In order to intitle them to take a verdict on the first count, they must have proved it to be a gift: which, it appears by the judge's report, they could not prove. And we have a verdict *for the defendant*, as to all the *other* counts.

The

The statute expressly distinguishes between *gifts*, and loans or other devices. And so indeed does their own declaration: for the first count is founded upon the former; the four others, on the latter.

This action being upon a penal statute, it therefore ought to be taken strictly.

This case, *as it is laid*, differs from that of *Busb v. Rawlins*: the resolution there does * not interfere with this. For here, "*corrupting Moore to give his vote*," must mean actually "*procuring him to give his vote*:" whereas the man did *not* vote so; and consequently, the other candidate (Mr. *Luttrel*) was not hurt, at all, by what the defendant did.

* That resolution was, "That the giving a bribe to forbear voting at the election of a member to parliament, was an offence within this same act and clause, altho' the man did not forbear to vote, but actually voted for the opponent's candidate; and that there was no need for the plaintiff to allege in his declaration, that the man did actually give or forbear his vote, according to his promise."

LORD MANSFIELD.—The first objection is in the nature of a motion for a new trial, on account of a *mis-direction* by the judge.

But the case of *Busb v. Rawlins*, is in point. And I wonder how it could ever be a doubt: for the offence was completely committed by the *corrupter*; whether the other party shall afterwards perform his promise, or break it.

Secondly, As to the verdict's being taken on a wrong count—The evidence *does* support the first count. For this is a *GIFT*: the note and all the rest is mere *evasion, colour, disguise, and device*, to evade the law.

But *if* it were not so, the verdict was given generally for the plaintiff. If, by mistake, it has been entered upon a count not proved; instead of the count which was proved, *that* is no reason for a new trial: the blunder has not injured the defendant. The court ought rather to rectify the mistake, by ordering the verdict to be entered upon the right count, agreeable to the evidence, and consequently

the *true* ground upon which the jury found for the plaintiff.

However, the *gift* is the *true* and proper count to take it upon: if it was really a *loan*, it would be *no* corruption.

Mr. Justice *Wilmot* held accordingly. This is the right and true count to take the verdict upon.

Per cur. Rule discharged.

Catherine How,
widow, v. Ed-
ward Strode, M.

6 Geo. III. C. B.

2 Wilton 269.

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sant. Plea pre-

scription for

common, from

time of cutting

and carrying a-

way corn, until

land resown.

Replication, a

custom to in-

close, which dis-

charges the land

from the right

of common.

Inclosure.

Rejoinder. De

injuria sua pro-

pria. Traversing

the custom.

Sur-rejoinder

taking issue upon

the custom.

Replevin—Avowry, that defendant took the cattle *damage feasant*.

Plea in bar the place in which, &c. is part of *East-field*, that plaintiff is seised of ten acres of land in *B.* and claims common of pasture in *East-field*, when the same is sown with corn, and it is cut and carried away, until it be resown; and at a proper time put in her cattle.

Replication to the plea in bar, that there are in *B.* two fields, *East* and *West-field*, and that the owners thereof intercommon while they lay not inclosed for a certain time.

A custom to inclose, and that such inclosure is freed from common of any other person, and that the person so inclosing, thereby frees and discharges all the uninclosed from all common, in respect to such land inclosed.

That he inclosed the place in which, &c. to which he had a right of common before, whereby all the uninclosed lands were freed from his said right of common; and that the place inclosed ought to be free from common of any other person.

Plaintiff *rejoins*, that she put in the cattle 'till defendant took them of his own wrong, and traverses the custom to inclose, &c.

The defendant sur-rejoins, and takes issue on the traverse.

Vide the plead-
ings at length in
Wilton.

This

This cause was tried at the last assises for the county of *Somerset*, the issue lying upon the defendant to prove the custom; it was reported by the judge, that the defendant produced five very old deeds, and several other deeds, which *proved the custom to inclose*; he also called seven old witnesses, three of the oldest proved the custom to inclose of their own knowledge, for a great number of years, and that they had been told (when they were young) by very old persons then living, that it was the custom for the land-owners in these fields to inclose; and said that they thought any man might inclose his land. As to the right of common, whilst the lands lay uninclosed, some of the witnesses said, that such owners of the uninclosed lands, had a right of common without stint, *but that after any of them had inclosed his land, such person had no right of common at all in the said fields, or either of them.*

Another witness said, if a man inclosed all his lands in the fields, he lost his right of common totally; but that if he left any bit, only an acre, uninclosed, he used to enjoy his common in regard to that acre, uninclosed, just as before, and used to put in any number of cattle without stint; several other old witnesses swore to the same effect, and here the defendants rested their case; whereupon the judge was of opinion that the defendant had not proved the custom, which he said was *intire*: that several of the witnesses had proved, that if a man inclosed 19 acres out of 20, it was the custom for him, in respect to the one acre not inclosed, to put into the uninclosed lands as many cattle as he pleased, without stint, and as he had done before he inclosed the 19

New trial, for mis-direction of the judge, upon the evidence given for the defendant at the trial, the judge being of opinion he had not sufficiently proved the custom, whereas the evidence did prove it.

acres, and therefore, the judge was pleased to tell the jury, that he thought the defendant had not proved the custom intirely; and that, if they believed the land inclosed in question was discharged and freed from any person having a right of common thereon, they should find for the defendant; if not, that they should find for the plaintiff: whereupon the jury gave a verdict for the plaintiff.

It was now moved for a new trial, for the *misdirection* of the judge: 1st, For that the custom to inclose was fully and clearly proved; and, 2dly, That the right of common before inclosure made, was for cattle *levant* and *couchant* upon each person's uninclosed lands; and this matter is not at all in issue, but is admitted on the pleadings, by both sides: the right of inclosure, with it's consequence, *viz.* it's being freed from any person's former right of common thereon, was the only matter in issue; the other was a legal consequence, and not traversable, (to wit,) that the owner of such inclosed land is barred of any future right to common on the uninclosed land in these fields; and what some of the witnesses said of common *without stint*, is nothing to the purpose, for there is no such thing as common *without stint* belonging to land; common belonging to land can only be for cattle *levant* and *couchant* thereon: that the custom to inclose was clearly proved, as appears by the evidence before stated; and, when the land is inclosed, it is freed and discharged from any person's former right of common thereon. And of this opinion was the whole court; and said, 1st, That the parties agree by the pleadings, that, while the lands in these open fields are uninclosed, all have a right of common
for

for cattle *levant* and *couchant*; 2dly, The custom to inclose, and that the land as soon as, and while inclosed, is free from common, is fully proved: the 3d matter is a consequence in law, and wanted no proof, *viz.* that, as soon as any person has inclosed, he has excluded himself from any right of common on any of the uninclosed lands: and any judgment given upon this record, cannot be a bar to any other party who may claim common in these fields *without* levancy and couchancy. *Per totam Curiam*, the verdict must be set aside for mis-direction of the Judge, and there must be a new trial.

This was an action upon promises against the defendant, as agent for work and labour, &c.

Plea—the general issue.

The cause was tried at the Sittings after last *Hilary* Term, before BULLER, Justice, when a verdict was found for the defendant, by the direction of the Judge.

Upon a motion for a new trial by *Cowper*, the following facts appeared from report.

In the year 1779, the defendant, being Governor of *Quebec*, appointed Captain *Sinclair* to the command of a fort called *Michilimakinac*, situated upon the lake *Huron*, in the province of *Canada*.

On the 17th of *August*, 1779, defendant transmitted certain instructions to *Sinclair*, respecting the government of the fort, in which he says,

“ You are to pay great attention to the *Indians* resorting to *Michilimakinac*, or furnished with necessaries from thence. Endeavour to preserve them in good humour; and attach them, by every means in your

Macbeath v. Haldimand, E. 26 Geo. III. B. R. Durnford and East. 1 V. 173.

An officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. The judge having directed the jury to find for the defendant upon that ground, motion for new trial was made, as conceiving he had been mistaken in point of law, and, consequently, misdirected the jury. Court of opinion the direction was right, and new trial refused.

“ power, to the King’s interest.” In a further part of the same instructions he adds, “ You will draw bills of exchange for defraying the contingencies incident to that post, in the manner practised by Major *De Peyster*, (an officer on whom that command had been before conferred,) taking care to moderate and reduce those expences, as far as can be done, without injuring the King’s service.”

For some time *Sinclair* employed one *Grant* to distribute presents among the *Indians*, and to procure military stores, &c. for the use of the garrison: and to defray these and other expences drew bills of exchange upon the Governor, according to his instructions. When these accounts came to the defendant, he made objections to several of the articles, as unnecessary, and exorbitant; and soon after recommended the plaintiff to *Sinclair*, by a letter dated the 16th of *May*, 1782, of which the following is an extract:

“ Upon an examination of the accounts, accompanying your late drafts, for expences incurred at *Michilimakinac*; the articles are, in general, charged at prices exceeding all bounds of moderation.

“ Upon the comparison of the prices made here, the advantages taken of the necessities of the crown, by the traders at *Michilimakinac*, is shamefully obvious; and it is more so in the account of Mr. *Grant*, who appears to be an agent for government, than in any other particular.

“ Persuaded that you have supplied your wants from those traders, in whom you have had the greatest reason to confide, I find there is but little to be expected from
“ any

“ any of them residing at that post: which
 “ induced me to make inquiry, if any per-
 “ son could be found here more worthy of
 “ the public confidence. A Mr. *Macbeath*,
 “ who will deliver this letter, and who has
 “ just made application for a pass, was men-
 “ tioned to me as a man of known and esta-
 “ blished integrity; and, upon a more par-
 “ ticular inquiry, I find that he has always,
 “ both here, and in the upper country, me-
 “ rited that character. I have proposed to
 “ him to supply the crown with such quanti-
 “ ties of *Indian* corn and grease, as may be
 “ wanted for the necessary purposes at that
 “ post; and likewise all other articles which
 “ shall occasionally be wanted in the engineer
 “ department, which he has undertaken to
 “ do for 10*l.* *per cent.* on the market
 “ prices at the place, (costs and charges;) a
 “ profit which appears to be reasonable, in-
 “ asmuch as it is greatly under that hitherto
 “ charged.”

(After some orders given relative to the plaintiff.)

“ These instructions, and all others that
 “ concern the interest of the crown, I am
 “ persuaded that you will cheerfully give
 “ him.”

A letter from the defendant to the plaintiff, dated *May 17, 1782.*

“ Having thought it fit to direct Lieute-
 “ nant-governor *Sinclair*, commanding the post
 “ of *Michilimakinac*, to employ you in supply-
 “ ing such quantities of corn and grease, and all
 “ other articles, as shall be wanted for the use of
 “ the crown at that post, in consequence of
 “ your offer to furnish the same at the rate of
 “ 10*l.* *per cent.* on the costs and charges here
 “ and

“ and to *Michilimakinac*, for all articles, corn
 “ and grease excepted, and these at the same
 “ rate where they shall be purchased; for
 “ which sufficient vouchers are to accompany
 “ your accounts: you are, therefore, hereby
 “ directed to make applications, from time
 “ to time, to Lieutenant-governor *Sinclair*,
 “ for such directions, information, and assist-
 “ ance, as will best enable you to execute
 “ that business to the greatest advantage for
 “ the public interest; as your continuing in
 “ this employ will intirely depend upon your
 “ conduct therein.”

Several special orders were proved from
Sinclair to the plaintiff, for supplying particu-
 lar articles, amongst which was the following,
 dated 1st of *August*, 1782.

“ You will be pleased for the future, with-
 “ out any requisitions in form, to provide
 “ for the different services of the post, in the
 “ manner least expensive to government, and
 “ still equal to the necessities of the different
 “ departments.”

In pursuance of these orders, the plaintiff
 furnished articles to a considerable amount.
 But when his bills, at the top of which was
 prefixed, “ *Government debtor to George Mac-*
 “ *beath, for sundries, paid by order of Lieute-*
 “ *nant-governor Sinclair,*” were sent to the de-
 fendant at *Quebec*, he made objections to se-
 veral of the articles, as being unreasonable,
 and furnished contrary to subsequent instruc-
 tions.

Afterwards, on the 2d of *July*, 1784, *Mat-*
thews (the defendant's secretary,) wrote the
 following letter to Mess. *Dobie* and *Forsyth*,
 who were agents for the bill-holders.

“ I am

" I am commanded by his Excellency General *Haldimand* to acquaint you, that, in consequence of instructions from the Lords Commissioners of his Majesty's Treasury, in answer to a representation made by him to their lordships, concerning the bills drawn upon him by Lieutenant-governor *Sinclair*, in the year 1782, which he thought it necessary to refuse payment of, his excellency, in conformity with the offer which he made to the holders of the said bills in the year 1782, is still willing to pay such parts of the charges, for which the said bills were drawn, as at that time appeared, upon examination, to be reasonable."

(After stating the amount of goods furnished for the engineer department, to the value of 9,266 *l.* 5 *s.* 1 $\frac{1}{2}$ *d.* which the Governor was willing to pay, the letter proceeded thus:)

" His excellency will also pay for all the goods or utensils furnished for the engineer department, so far as they shall appear to be charged at reasonable prices, to be ascertained by merchants appointed for that purpose, by his excellency and the holders of the bills. And he will further pay for the labour, so far as the accounts thereof shall appear to be properly vouched.

" But with regard to the charges for the hire of horses and carts, his excellency, from the exorbitance of the charge, will have nothing to do therewith, leaving, nevertheless, to the complainants to take such methods to procure redress therein, as they shall think proper.

" With respect to the *Indian* department, his excellency will pay such part of the articles

“ ticles as compose the accounts for which the
 “ bills were drawn, as were not purchased
 “ contrary to his orders to Lieutenant-gover-
 “ nor *Sinclair*, dated 22d *August*, 1781; and
 “ except also for the articles furnished by
 “ Lieutenant-governor *Sinclair* himself, which
 “ his excellency will not pay, as they were
 “ received from the *Indians*, in expectation
 “ of being well repaid, by the presents which
 “ they afterwards received, from the King’s
 “ stores.

(The letter then stated the account of *Indian* expences, amounting to 12,715 *l.* 9 *s.* 10 *d.* and concludes by saying,)

“ You will therefore see, by the foregoing
 “ state, that the sum proposed by his excel-
 “ lency general *Haldimand*, to be immediately
 “ paid, amounts to 21,981 *l.* 14 *s.* 11½ *d.*
 “ *New York* currency.”

The bills which *Sinclair* drew in favour of the plaintiff, were drawn on the defendant as governor and commander in chief.

The plaintiff finding that all these bills drawn by *Sinclair*, and indorsed by himself, which were to a much greater amount than the abovementioned sum, would not be accepted by the defendant, received a partial payment from him, with a proviso, that it should not prejudice his claim for the remainder; to recover which, was the object of the present action.

The plaintiff remained in his post ’till 1785.

It was acknowledged at the trial, and in court, that all the accounts had been submitted to a board of officers by defendant, for them to examine, and report what charges ought to be allowed; and that the sum ad-
 judged

judged by them to be due, which fell very short of the plaintiff's demand, had been paid by the treasury.

BULLER, *Justice*, after reporting the above facts, said, that he had been of opinion at the trial, that the goods in question having been supplied for the use of government, and the defendant not having personally undertaken to pay, the plaintiff ought to be non-suited. That it appeared to him, that the plaintiff had acted with the defendant solely in the character of commander in chief, considering him as the agent of government. That all the letters imported it to be a transaction on the part of government, and that the accounts confirmed it. But the plaintiff's counsel appearing for their client when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him, whether, in the event of the defendant's not being liable, any other person was, he told them, that was no part of their consideration; but, being willing to give them any information, he added, that he was of opinion, that if the plaintiff's demands were just, his proper remedy was by a petition of right to the crown: on which they had found a verdict for the defendant.

The rule for granting a new trial was moved for, on the mis-direction of the judge upon two points.

1st, That the defendant had, by his own conduct, made himself personally liable, which question should have been left to the jury.

2dly, That the plaintiff had no remedy against the crown, by a petition of right, on

the supposition of which the jury had been induced to give their verdict.

Lord MANSFIELD, *Ch. J.* now declared, That the court did not feel it necessary for them to give any opinion on the second ground.

His Lordship said, that great difference had arisen since the revolution, with respect to the expenditure of the public money. Before that period, all the public supplies were given to the King, who, in his individual capacity, contracted for all expences. He alone had the disposition of the public money. But since that time, the supplies have been appropriated by parliament to particular purposes; and now, whoever advances money for the public service, trusts to the faith of parliament.

That, according to the tenor of Lord *Somers's* argument (a) in the banker's case, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the banker's case, and parliament was afterwards obliged to provide a particular fund towards the payment of those debts (b). Whether, however, this alteration in the mode of distributing the supplies, had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery against the crown, application must be made to parliament, and it would come under the head of supplies for the year.

Bearcroft and *Bower* shewed cause.

They allowed that a person, acting in a public situation under government, might, by his own conduct, make himself personally liable for contracts, which, from the nature of his office, he would not otherwise be answerable for.

(a) Vide 1st State Trials, 159.

(b) The Stat. 12 & 13 W. III. c. 12. §. 15. provides, that, in lieu of the annuities granted to the bankers and all arrears, the hereditary excise, shall, after the 26th December, 1701, be charged with annual sums equal to an interest of 3 per cent. till redeemed by payment of one moiety of the principal sums.

for. But the plaintiff should make out a very strong case, in order to induce the court to believe that such was the agreement. As if a person, residing at a distance abroad, absolutely refused to treat with the government, but chose rather to rely upon the personal security of the governor, who was upon the spot, and who was willing to treat upon those conditions: but they contended, in this case, that the defendant had acted avowedly as the agent of government, and did not intend to make himself personally responsible.

But considering this even as a common transaction between private parties, apart from public considerations, which would weigh in this case, the plain question would be, to whom was the credit given? It appears, upon the face of it, not to have been given to the defendant. The goods furnished were not for his use, and so the plaintiff knew. The defendant's letter to the plaintiff, when he was appointed to the post, expressly mentions that they were for the use of the crown.

The orders given by the defendant were in the quality of governor, and therefore the plaintiff must be taken to have contracted with government. It is no answer to say, that the bills were drawn on the defendant, for that is the common course of business; and the letter from *Matthews*, the defendant's secretary, speaks of an application to the treasury, which shews, that it could not be considered as a personal demand on the defendant.

Supposing the defendant in the situation of a private steward, if it be notorious that the orders are given by him for his employer, and that he acts merely in the capacity of an agent, that is sufficient to shew the nature of the

transaction, and to whom the credit has really been given.

In ordinary dealings, where it is a matter of doubt to whom the credit has been given, the question has frequently been decided, by having recourse to the creditor's books, or by producing his bills, and seeing whom he himself has debited. In this instance, the plaintiff has debited government.

Another circumstance is here disclosed, which decides as to whom the plaintiff gave the credit: for he first applied for payment to the treasury, and, on their refusal, had recourse to the defendant; which manifestly proves, that he looked upon government as his debtor.

They then mentioned the case of General *Burgoyne*, against whom a bill was filed in Chancery, for a specific performance of a contract, for the supply of artillery carriages in *America*. Lord THURLOW, *Chancellor*, said, that there was no colour for the demand, as against the defendant, who acted only as an agent for government, and dismissed the bill with costs. His Lordship also made the same observation, which the learned Judge made in this cause, that the plaintiff had his remedy against the crown by petition of right.

Cowper, *Law*, and *Adam*, in support of the rule, contended, that the evidence which was produced at the trial was such, as ought to have been left to the jury to determine, whether the defendant had not made himself personally liable.

In general, a commanding officer is not answerable for stores, and other articles furnished notoriously for the use of government; but there is no doubt that he may become so by his own conduct. Here the plaintiff was directed

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rected by the defendant to obey the orders of Lieutenant-governor *Sinclair*. Every article which he furnished was in obedience to *Sinclair's* commands; and *Sinclair* himself was instructed to draw bills for the payment of those articles, not on the government, or on any official paymaster, which would have afforded a strong presumption in discharge of the defendant's liability, but his orders were to draw on the defendant himself.

The partial payment which was afterwards made, was under the special directions of the defendant, who, throughout the whole transaction, exercised his own discretion, as to which part of the charges should be allowed or rejected. The defendant's own conduct, therefore, has made him personally liable.

Distance of place and situation might also have been a reason with the plaintiff, for giving the defendant personal credit: for the parties being removed so far from the seat of government at home, there was no other person to whom the plaintiff would so naturally look for payment, as the defendant himself.

The production of the letters at the trial, was an additional reason for leaving the question to the jury, whose province it was to determine the import of them.

In an action brought against General *Burgoyne*, to recover a sum of money due to the plaintiff, as provost-marshal, the defendant having promised that he should be paid at the same rate as the provost-marshal under General *Howe* had been, a similar objection to the present, was started on the trial, by Mr. *Lee*, against the legality of the action; but Lord *Mansfield* refused to nonsuit the plaintiff, upon which he went into his case;

and it afterwards appeared, in the course of the inquiry, that the plaintiff's demand had been satisfied. From this it is evident, that his Lordship thought a commanding officer might make himself liable, and that whether he had, or not, was a proper subject for the inquiry of a jury.

Taking this to be the case of a factor residing abroad, who transacts business for his principal in *England*; if the former had undertaken in the same manner that the defendant has done in this case, he would have made himself personally liable, since they may both be bound.

Supposing that the articles furnished were for the use of government, that will not vary the question. A master of a ship, who contracts for necessaries for the use of the ship, is personally liable, though he is known at the time not to be the owner (a). At all events, if there be any difference between this case and that of agent and principal, to which the present is likened, yet every agent who personally undertakes, cannot dispute his liability.

The whole question, therefore, should have been left to the jury, whose conduct proved that they entertained doubts upon it, 'till they were informed that the plaintiff had his remedy against the crown.

But if there is no remedy, in the form of a petition of right against the crown, on account of the appropriation of the supplies since the revolution, and the public is to be considered as the real debtor, then there was no other person, against whom this demand could so properly be urged, as against the defendant,

(a) Cowp. 639.

dant, who represented and acted as ostensible agent for the public in this transaction.

LORD MANSFIELD, *Ch. J.*—The only question before the court is, whether the *defendant* is liable or not in this action? If he is, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party, can induce the court to make him so.

There is no colour to say that he is liable in his character of commander in chief.

In a late case which was tried before me, where one *Savage* brought an action against Lord *North*, as first lord of the treasury, in order that he might be reimbursed the expences which he had incurred in raising a regiment for the service of government, I held that the action did not lie.

So in another case of *Lutterlob* against *Halsey*, which was an action brought against the defendant, who was a commissary for the supply of forage for the army, and by whom the plaintiff had been employed in that service, the commissary was held not liable.

In the present case it was notorious that the defendant did not personally contract; the plaintiff knew at the time that he furnished the stores, that they were for the use of government: and he afterwards made government debtor in his bills.

But it has been urged, that the defendant made himself liable, after the debt was contracted. In my opinion there is no ground for such an argument. The evidence does not warrant it.

Then it was objected, that whether the defendant had made himself liable or not, was a question, which ought to have been left to the jury to decide. But there was no evidence

which was proper for their consideration, for the evidence, consisting altogether of written documents and letters, which were not denied, the import of them was matter of law, and not of fact. Therefore I am of opinion that the verdict should stand.

WILLES, J.—I think, under all the circumstances of the present case, that the defendant is not personally liable. The goods were furnished for the use of the crown: government was made debtor: and all the letters speak of the transaction, as having been considered in that light. Then if the defendant was liable, his person and property would be subject to an execution, and he must afterwards apply to government for a reimbursement, which would be no satisfaction to him, for the inconvenience he had been put to.

The letter from defendant's secretary shews, that what he did was under the direction of government, and that the fund, out of which the plaintiff was to be paid, was the treasury. And though I consider the faith of government, as pledged for the acts of the defendant, yet I cannot consider him as personally answerable.

As to the objection, that this should have been left to the jury, it is decisive, that this question comes before the court on a motion to set aside the *verdict*, and not a *nonsuit*. There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury.

ASHHURST, J.—In great questions of policy, we cannot argue from the nature of private agreements. But even in these cases, the question

question must be, what was the meaning of the parties at the time of entering into the contract?

A person acting in the capacity of an agent, may undoubtedly contract in such a manner as to make himself personally liable: and that brings it to the true question here; namely, whether, from any thing that passed between the parties at the time, it was understood by them, that the plaintiff was to rely upon the personal security of the defendant? But nothing appears from the evidence in this case, to warrant such a conclusion. Government was made debtor; and it is evident that the plaintiff looked to them for payment: for he first made application to the treasury, and his demand against the defendant was only an after-thought, when he found he could not obtain the money in any other way. Then it seems to me, that there is nothing in this transaction, to fix the defendant, or to shew that the plaintiff looked to him as his debtor, at the time that the credit was given.

Great inconveniences would result from considering a governor, or commander, as personally responsible in such cases as the present: for no man would accept of any office of trust under government, upon such conditions. And, indeed, it has frequently been determined, that no individual is answerable for any engagements which he enters into on their behalf.

There is no doubt but the crown will do ample justice to the plaintiff's demands, if they are well founded.

BULLER, J.—I do not agree with my brother *Willes*, as to the construction of letters. If they are written in so dubious a manner, as to be

be capable of different constructions, and can be explained by other transactions, the whole evidence must be left to the jury, to decide upon; for they are to judge of the truth or falshood of such collateral facts, which may vary the sense of the letters themselves: but if they are not explained by any other circumstances, then, like deeds, or other written agreements, the construction of them is a mere matter of law.

In what character then, as appears from these documents, did the defendant act throughout this business? It is true, that he gave the orders to *Sinclair*, and that every thing which the plaintiff did, was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defendant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.

Rule discharged.

Oswald and others, executors of Oswald, against Legh. T. 26 G. III. B. R. Durnford & East. 1 V. 270.

Twenty years without any demand, is of itself a presumption that a bond has been paid.

A verdict being found for the plaintiff, motion for a new trial, upon the ground that the jury should have been directed

Debt on bond by the executors of the obligee against the obligor.—Pleas—*non est factum*; *solvit ad diem*; & *solvit post diem*. This cause was tried at the sittings after last *Easter* term, before *Buller*, J. at *Guildhall*, when it appeared, that the bond was executed on the 17th *January*, 1765. That in *June*, 1784, the obligee sued out a writ upon the bond, but he died within three months afterwards, without having ever served it. That the present action was commenced last *Easter* term. That the parties were both men of fortune, residing in *England*, and had lived upon terms

of

of intimacy. The jury found a verdict for the plaintiffs.

Bower moved for a rule to shew cause why there should not be a new trial, on the ground that the jury should have been directed to find for the defendant, on the presumption of the bond's having been satisfied, as the parties had lived in the kingdom, and no demand had been made for nineteen years and an half. That in some cases, this presumption had arisen where demand had not been made even for a less time. In an action of debt on a bond by *Kowley* against *Tomkins* (a).

directed to have found for defendant, upon presumption of payment arising from length of time, and other circumstances. New trial refused.

(a) *Salop Summer assizes, 1766.*

Aston, J. mentioned the case of *Weldon v. Davis*, at *Guildhall*, after *Trinity*, 1760, which he said he had often heard cited by Lord *Mansfield*, where eighteen years was held sufficient to raise a presumption upon, unless some reason was assigned for not calling on the party. In that case, the case of *Moyle* against Lord *Roberts* was cited; where the plaintiff, in order to obviate the presumption, shewed two writs of *testatum capias* to have been sued out, but not served, because the party could not be found; in which last case Lord *Mansfield* said, there was no foundation for the presumption.

BULLER, J.—I have always been of opinion, that no less time than twenty years, could of itself form a presumption that a bond had been paid; and as there was no evidence at the trial in aid of the presumption, I left the question to the jury, with strong directions in favour of the plaintiffs; for even with regard to the rule of twenty years, where no demand has been made during that time, that is only a circumstance for the jury to found a presumption upon, and is in itself no legal bar. In those cases, where satisfaction of a bond

has

has been presumed within a less period, some other evidence has been given in favour of such a presumption, such as having settled an account in the intermediate time, without any notice having been taken of such a demand.

It is manifest that this doctrine of twenty years presumption, was first taken up by Lord *Hale*, who only thought it a circumstance from whence a jury might presume payment. In this he was followed by Lord *Holt*, who held, that if a bond be of twenty years standing, and no demand proved thereon, or good cause of long forbearance shewn, on *scilicet ad diem*, he should intend it paid (b).

(b) 6 Mod. 22.

(c) Hil. 1 G. II.
at Guildhall.

This doctrine was afterwards adopted by Lord *Raymond*, in the case of *Constable v. Somerset* (c): that was debt upon bond, where the defendant, an executor, craved oyer of the bond, and of the condition, which appeared to be for the payment of so much money, six months after the death of the defendant's testator. The defendant in his plea averred, that the testator died on the 15th *March*, 1711, and that he had paid the said sum on the 16th *March*, 1711, within six months after the testator's death, and thereupon issue was joined.

The defendant relied on the ground that, as he, after the death of the testator, his father, had an estate in the plaintiff's neighbourhood, and was constant and regular in all his payments, it should be presumed that the money was paid to the plaintiff. In answer to this objection, evidence was given of a demand of the money on the defendant himself in 1725; and the Chief Justice said, that the presumption of money having been paid, which was due on bond, if it were put in suit after twenty years

standing,

standing, was not the old, but a new doctrine, which had been introduced in Lord *Hale's* time, and that he would never suffer a plaintiff to be *stripped* of a just debt, by such a presumption as was then contended for.

This opinion seems to fortify the idea which I took up at the trial, in answer to a *dictum* which was then cited (*a*), that the question of presumption of payment within a less time than twenty years, had been left to a jury, which was, that it must have been left to them upon some evidence; and in such cases the slightest evidence is sufficient. In one of the *Winchelsea* cases (*b*), Lord *Mansfield* expressly said, that if a bond had lain dormant for *twenty years*, it shall be presumed to be paid. (*a*) 1 Burr. 434. (*b*) 4 Burr. 1963.

The court, however, inclining to believe that the real truth of the case was with the defendant, desired that he would make an affidavit; which being read upon a subsequent day, and not proving satisfactory, they

Discharged the rule.

And Lord MANSFIELD, *Ch. J.* said, that there was a distinction between length of time as a *bar*, and where it was only *evidence* of it: the former was positive, the latter only presumption; and he believed that in the case of a bond, no positive time had been expressly laid down by the court; that it might be eighteen or nineteen years.

The plaintiff, who was an inn-keeper, brought this action against the defendant for seising and taking his goods. The defendant pleaded the general issue, and proved that he took the goods as messenger under a commission of bankrupt. And the question was, whether the plaintiff was a trader?

Upon

Patman v. Vaughan. H. 27 G. III. B. R. Durnford & East. 1 V. 572.
An inn-keeper who sells liquor out of the house to all customers that apply for it, is subject to the bankrupt

bankrupt laws; however inconsiderable the extent of such dealing, and the profits arising from it, may be.

It was left to the jury whether the plaintiff had endeavoured to make a profit of his trading, and was ready to sell to any who applied, and not merely as a matter of favor, and that then the quantum and extent of trading was immaterial, and they should find for the defendant, which the jury did.

Motion for new trial, on the ground that the direction was contrary to law, or the finding of the jury contrary to evidence.

New trial refused.

Upon the trial before *Buller*, Justice, at the sittings after last term for *Westminster*, it appeared in evidence, that the plaintiff had kept a public-house for nine months, during which time he had sold to three or four persons about six gallons of spirits altogether. One of the instances was, that, having bought five gallons of spirits of one *Bennett*, he had desired him to send two of the five into the country, to a person who had ordered it of him. It was also said by his own servant, that if any person had sent for liquor, he might have had it. The learned judge left the question to the jury, with this direction, that if they were of opinion that the plaintiff had endeavoured to make a profit of his trading, and was ready to sell to any person who applied to him, and not merely as a matter of favor, that then the *quantum* and extent of the trading was immaterial, and they should find for the defendant. The jury having found for the defendant accordingly;

Erskine now moved for a rule, to shew cause why there should not be a new trial, on two grounds; either that this was a direction contrary to law; or that the finding of the jury was contrary to evidence. After observing, that, in order to subject a man to the bankrupt laws, it was necessary by the 21 *Jac. I. c. 19.* that he should seek his living by trading; and that whether the facts found amounted to a trading, was a question of law (a); he stated the question to be, whether in point of law, the proportion of the plaintiff's trading out of the house, was sufficient to make him a bankrupt. He admitted that, if the *quantum* of his trading was in proportion to his usual and principal business, he was liable to the bankrupt laws; as in the case of *Mayo and Archer* (b), but

(a) *Cowp.* 745.

(b) *1 Stra.* 513.

but he contended that in the present case, the *quantum* of the plaintiff's dealing bore no such proportion. That it had always been considered 'till very lately, that the *quantum* of the trading was material. It was so laid down by Lord Chief Baron *Parker*, in *Buscall v. Hogg* (c), where the instances of trading of one *Thickpenny*, an inn-keeper, were much more numerous and stronger than the present: and though the court afterwards set aside the nonsuit in that case, yet it was because it did not appear to them, what proportion the trade in his inn bore, to his trading abroad, and out of doors. And *Wilmot, Ch. J.* said, "that if *Thickpenny's* trade and profits in his inn, were much larger than his trade and profits abroad out of his inn, he should not think him liable to the bankrupt laws." The distinction seemed to be this, that wherever a man follows one trade only, though his dealing be ever so small, he is liable to the bankrupt laws. But where he has another mode of getting his livelihood, and his trading is only collateral, and bears but a small proportion thereto, in that case the law will not raise a presumption that he seeks to get his living by it. If that were so, either the learned judge's direction to the jury was wrong, or they have found a verdict not warranted by the evidence.

ASHHURST, J.—I do not now consider the question of law to be governed by the *quantum* of the trading: but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where, if any stranger, who applies, may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour to any particular person,

(c) 3 Wils. 146.
Vide post LX.
(16.)

person, there the person so selling, is subject to the bankrupt laws.

BULLER, J.—The case of *Bartholomew v. Sherwood* (a), was much stronger than the present. On the trial of this cause I left the question to the jury, with this direction, that if they were of opinion that the plaintiff meant to sell spirits out of his house, and to get a profit by it, the quantity which he sold was immaterial, and he must be considered as a trader. It was proved at the trial, that the plaintiff lived in the public-house only nine months, during the course of which time, there could not be many instances adduced in evidence of his having sold spirits out of the house: but I particularly directed the jury to advert to the circumstance, of there not being any one instance of any person, who had applied to buy liquor, having been refused. That is the great point; for as to the extent of the dealing, and the profit which he made, it is immaterial: for if a man makes a considerable profit, he is not likely to become a bankrupt; it is only in cases where the profits of the trade are inconsiderable, that such an event is likely to take place. Now the circumstances here were, that from the time when the plaintiff took this house, he was willing to sell spirits to any person who applied: therefore, though the time was short, and the instances of his trading were few, yet I thought it proper to be left to the jury: and they found a verdict for the defendant.

Rule refused.

(a) Willett v. Hudson. E. 26 Geo. III. B. R. S. P.

The question here was, if a farmer had dealt in

(a) *Bartholomew* and another, assignees of *Davis*, against *Sherwood*, M. 27 Geo. III. B. R.

This was tried before Mr. Baron Eyre, at the Summer assizes at Oxford, 1786. The plaintiffs,

plaintiffs, as assignees, brought an action of trover against the defendant, who claimed under an execution against the goods of the bankrupt. in horses in such a manner as to make him a trader.

The only question was, whether *Davis*, the supposed bankrupt, was a trader, within the meaning of the statutes concerning bankrupts. It was contended that he was a dealer in horses: as to which it appeared in evidence, that *Davis*, at this time, and for a few years past, had rented a considerable farm at *Whitchurch*; and that he kept two, and occasionally three teams of horses, for the farming business. That previous to his taking this farm, he had lived with an uncle, during which time he attended several different fairs, and occasionally bought and sold horses; that after he took this farm, there were several instances of his attending fairs, and of every now and then buying a horse, which was not calculated for the farming business, and which he constantly sold again. It appeared, that during the course of two years, he had bought and sold five or six horses in this manner, two of which had been sold directly after he had bought them, for the sake of a guinea profit, and another was sold again within three days. No evidence being offered to contradict this on the part of the defendant, the judge left it to the jury on the plaintiff's evidence, and they found a verdict for the plaintiff.

A motion was made for a new trial last *Michaelmas* term, which, after argument, was refused. And

ASHHURST, J. said, It is admitted on the part of the defendant, that this was a matter of evidence, and proper for the consideration of the jury. Then if it were proper to be left

to them, and there was no evidence to contradict it, they were bound to find as they did. The general principle is right, that a farmer, as such, is not an object of the bankrupt laws; and if a farmer, in the course of his business, buys a horse, and after using him for some time, sells him again, that will not subject him to the bankrupt laws. But in this case the evidence is, that he bought horses for the express purpose of gaining by it.

BULLER, J.—It appears upon the evidence, that there were many instances of the bankrupt's buying horses which he could not use in his farming business, and others which he bought for the express purpose of selling again. Whether there were more or fewer instances, was proper to be left to the consideration of the jury.

It is like the case of a vintner, who if he sell only a few dozen of liquor to particular friends, cannot be made a bankrupt; but if he is desirous to sell to every person who applies, that will subject him to the bankrupt laws. But in all these cases the question is, whether the person buys and sells with a view to make a profit by it; and that is proper to be left to the consideration of the jury. Here it was left to them, and they have found that *Davis* was a trader.

Rule discharged.

Borthwick v.
Carruthers. E.
27 G. III. B. R.
Durnford & East.
1 V. 648.
If plaintiff reply
to a plea of in-
fancy, that de-
fendant, after he
attained 21, con-
firmed the pro-
mise, and defen-
dant rejoin that
he did not;
plaintiff

To an action for goods sold and delivered, the defendant pleaded, amongst other things, infancy. The plaintiff replied, that after the defendant had attained his age of twenty-one years, he ratified and confirmed the several promises and undertakings, &c. To this the defendant rejoined, that he did not, after he had attained his age of twenty-one years, ratify and confirm the promises, &c. and thereupon

issue

issue was joined. On the trial before *Buller, J.* at the last sittings at *Westminster*, the plaintiff proved a promise by the defendant, and rested his case there. The counsel for the defendant contended that the plaintiff had not proved the whole of his replication; for that it was incumbent on him to shew that the defendant was of age at the time when the promise proved was made. But *Buller, J.* being of opinion that the proof of infancy lay on the defendant, within whose knowledge the fact was, and who wished to take advantage of it, the plaintiff obtained a verdict.

plaintiff need only prove a promise, and defendant must shew he was under age at the time.

The judge of opinion the proof of infancy lay on the defendant, and verdict for the plaintiff.

Motion for new trial, on the ground of misdirection:

New trial refused.

A motion was made by *Gibbs*, to set aside the verdict and enter a non-suit, upon the ground that the plaintiff having alledged in his replication that the defendant was of age, at the time of confirming the promise, it became necessary for him to prove him to be so. That it was a material allegation to support the plaintiff's replication; and if it were necessary to alledge it, it was also necessary to prove it.

ASHHURST, J.—This was a fact, which, if true, rested within the knowledge of the defendant, and which it might be impossible for the plaintiff to be able to prove. In general, such a fact is proved by a copy of the register of the baptism, which the plaintiff may not know where to find; and in some instances, as in case of a private baptism, is not possibly within his power, therefore the proof of the fact lay upon the defendant.

BULLER, J.—I do not agree with the general position, to the extent in which it has been laid down, that the plaintiff is bound to prove every thing that he alledges. For in actions on the game laws, although it is necessary to alledge, that the defendant was not qualified,

yet the plaintiff need only prove the offence, and then, if the defendant is really qualified, it is incumbent on him to shew it.

In the present case, the defence arises from a personal incapacity to contract, which lies only within the defendant's knowledge, and which, therefore, he ought to prove.

GROSE, J.—It was sufficient in this case for the plaintiff to prove the promise; and it was incumbent on the defendant to prove infancy, if he had meant to take advantage of it; for it is to be presumed that when a man contracts, he is of proper age to contract, until the contrary be shewn.

Rule refused.

Doe, on the demise of Freeland, v. Burt. E. 27 Geo. III. B. R. Durnford & East. 1 V. 701.

A demise of premises in Westminster, late in the occupation of A. particularly describing them, part of which was a yard, does not pass a cellar situate under that yard, which was then in the occupation of B. another tenant of the lessor. And the lessor, on an ejectment brought to recover the cellar is not stopped by his deed from going into evidence, to shew that the cellar was not intended to be demised. Motion for a non-suit to be entered, upon the ground that the

Ejectment, for a cellar and wine vaults, in Westminster, tried before Buller, at the sittings after last term. The defendant claimed under a lease from the lessor of the plaintiff, of certain parts of a messuage, situated on the west side of *Swallow-street*, described to be one room on the ground-floor, and a cellar thereunder, and a vault contiguous and adjoining thereto; and three rooms, together with the ground whereon the same now stand, and together with a piece of ground on the north side, particularly describing it, with an exception of a right of way. It was admitted that the vault in question was under this piece of ground, which was a yard, and the whole were described to have been late in the occupation of A.

The defendant rested his title on the maxim that *cujus est solum, ejus est usque ad cælum & ad inferos*. The lessor of the plaintiff offered evidence to shew that at the time of the lease the cellar in question was in the occupation of B. another tenant: and therefore that it could

could not have been the intention of the parties that it should pass by the lease to the defendant; and that the defendant had not claimed it 'till after the expiration of that lease. The defendant's counsel objected to this evidence, because the lessor of the plaintiff was estopped by his deed, from saying it was not meant to pass. But *Buller, J.* was of opinion that the evidence was admissible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a non-suit, if the objection was well founded.

the judge had
permitted evi-
dence that was
not admissible.
Rule refused.

Mingay now shewed cause against a rule for entering a non-suit. The evidence offered was not contradictory to, but in explanation of the deed. It is evident that it was not the intention of the parties, that the cellar should pass by the defendant's lease, because every thing which was intended to be leased, was particularly described, and no notice is taken of the cellar. And the lessee enjoys premises which answer to every part of the description in the lease. Besides the premises intended to be demised, are described as late in the possession of *A.* and this cellar was in the occupation of *B.* According to the description of the premises, therefore, the defendant has no claim to the cellar, unless he is intitled by the strict operation of law, for want of an exception of that, which was not intended to be leased. And it is to be considered, that in *London* and *Westminster*, it is not unusual for landlords to let the buildings above ground to one tenant, and those underneath to another; so that the strict rule of law cannot be applied to cases like the present. But a farther argument also arises from the circumstance of the cellar being in lease to another person, at the time when the

defendant's lease was granted; so that the lessor of the plaintiff could not have granted it, even if he had wished so to do.

Bearcroft and S. Heywood, contra.

The lessor of the plaintiff is estopped by his own deed, from recovering these premises, for he is the lessor of the defendant, as well as of the plaintiff; and whatever right any third person might have, he cannot dispute the defendant's title. The rule of law is clear, and the question is as to the application of it. The principle is, that every grantor is estopped not only from saying that he did not grant, but that he had no estate in the premises. Now this ejectionment is for a cellar, which is locally situated under the ground which it is admitted was demised to the defendant: and the lease passed every thing which was under it. But supposing the strict rule of law could not be applied to the present case, and that the intention of the parties could be enquired into, it is clear that the lessor of the plaintiff did not intend to except the cellar in the defendant's lease: for whatever was intended to be excepted, is mentioned in the lease; there being an exception of a right of way. As to the defendant's not claiming 'till after the expiration of the other lease to *B.* that does not assist the right of the lessor of the plaintiff: for the same question of law still arises: and it was no objection to the lessor's granting the cellar to the defendant, because it was then on lease to *B.* for perhaps the defendant was not to take possession, 'till after the expiration of the other lease.

ASHHURST, J.—It appears plainly from the evidence, that this objection is against the justice of the case; for it was not in the contemplation

templation of the parties, at the time of the lease, to pass the cellar; and it appears, that, for three or four years after the defendant's lease, the lessor of the plaintiff received rent, from the former tenant of the cellar. The only question is, whether the court are absolutely bound, by the terms of this lease, to put the construction on it, for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject-matter; and it may be necessary to put a different construction on leases made in populous cities, from that on those made in the country. We know that in *London*, different persons have several freeholds over the same spot; different parts of the same house are let out to different people. That is the case in the inns of court. Now it would be very extraordinary to contend, that, if a person purchased a sett of chambers, then leased them, and afterwards purchased another sett under them, the after-purchased chambers would pass under the lease.

In the present case, considering the nature of this property, it was proper to let in evidence, to shew the state and condition of it at the time when the lease was granted.

Prima facie, indeed, the property in the cellar would pass by the demise; but that might be regulated and explained by circumstances: therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence offered at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant.

BULLER, J.—Where there is a conveyance in general terms, of all that acre called *Black-acre*, every thing which belongs to *Black-acre* passes with it.

And there the rule, which has been mentioned, *primâ facie* obtains. But whether parcel or not of the thing demised, is always matter of evidence. Suppose the premises in question had been the inheritance of another person, at the time of this demise, instead of their being in lease, they clearly would not have been parcel of this demise. Then their being in lease to another person, under this plaintiff, cannot vary the question, whether parcel or not. In the next place, it is very clear, on inspecting the lease itself; these words cannot receive the general construction of the law. This is a lease of a part of a messuage, consisting of one room on the ground-floor, *with a cellar thereunder*: now, if the argument for the plaintiff would hold, the cellar would have passed with the room on the ground-floor, without particularly specifying it. Then a description of another part of the premises is, “of ground, together with three rooms which “stand on it:” which shews that the parties have particularly described every thing which was intended to pass. Then follows a demise of the yard described, with the same particularities, specifying the abuttals and the dimensions.

GROSE, J.—This is a demise of premises in *Westminster*, and the question is, whether it appears to have been the intention of the parties to demise this cellar. But every thing which was meant to be demised is particularly described in the lease, and no notice is taken of this. It might as well be contended, that
a lease

a lease of an house in the *Adelphi*, would pass the warehouses underneath. But it would be the greatest injustice to put the general construction of law, on grants of the houses in that building; for we all know that those houses are held under titles intirely distinct from the cellars and warehouses underneath. And here the premises demise are described to have been lately in the occupation of *A*. And if the parties had intended that this cellar in question should have passed, it would have been described as being in the possession of *B*. But this cellar not being a part of the premises, nor appurtenant to them, did not pass under this lease.

Rule discharged.

UPON a motion for a new trial, where *Bearcroft*, *Bower*, and *Milles*, argued for the defendant, and *Plumer* for the lessor of the plaintiff, the court took time to consider, and now

ASHHURST, J. delivered the opinion of the court as follows:

This was an ejectment brought by the lessor of the plaintiff, claiming under a demise made by Lord *Abingdon* to him, by deed, dated in 1784, where the trust of the term was for the benefit of creditors. The defendant claimed under a lease, as it was opened by the defendant's counsel, (at the last *Oxford* assises, before *Grose*, J.) dated in 1779; which was prior in point of time to the demise to the lessor of the plaintiff. The agreement, when produced in evidence, appeared to be on paper unstamped, and not under seal; it imported to be articles of agreement between Lord *Abingdon* and the defendant's father, by which Lord *Abingdon*, in consideration of a sum of money

Goodtitle, on the demise of Estwick, against Way, E.

27 Geo. III. B. R. Durnford and East, 1 V.

735. A paper containing words of present contract, with an agreement that the intended lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself; and therefore it need not be stamped, if executed before 23 G. III. c. 58. The trustee of a term to satisfy creditors, not having notice of an agreement for

to

a lease, before the grant of the term, may maintain an ejectment against the tenant in possession, under the agreement. A lease in writing, though not under seal, cannot be given in evidence, unless it is stamped. Whether the judge was right or wrong in his opinion, the defendant not being able at law to make a defence, the court refused a new trial.

to be paid by *Way*, sold him the goods in his house at *Rycot*. The subsequent part of the agreement was as follows: "And further the said Earl of *Abingdon* doth hereby agree to lett, and the said *Richard Way* agrees to rent and take for the term of seven, fourteen, or twenty-one years, in case the said Earl shall so long live, at and for the rent of 1,400 *l.* a year, to be paid half-yearly, (the said Earl to pay or allow all manner of tithes and taxes, both ordinary and extraordinary,) all his estate, &c. at *Rycot*. It is agreed the said *Richard Way* shall enter upon all the said premises immediately, but not commence payment of rent until *Lady-day* next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties, on or before *Michaelmas* next."

On the production of this, it was contended, that this being produced as a lease, and not being stamped, it could not be read in evidence; and, the judge being of that opinion, the cause was not further gone into, and the plaintiff had a verdict. A motion has been made for a new trial, on the ground that this was not in fact a lease, though it was so opened by the defendant's counsel, but only an agreement. On the part of the plaintiff, it was contended, that this is a lease, being by words *de presenti*; for which was cited *Prosser v. Philips*, at *Nisi Prius*, before Mr. Baron Perrot; or taking it not to be a lease, but only an agreement for a lease, then it gave the defendant only an equitable title, which cannot be set up in a court of law against the plaintiff, who has a legal title. So that either way the verdict was right.

On

On the part of the defendant it was contended, that though, in common parlance, this may be termed a lease, it is in law only evidence of a parol demise, it not being under seal, and that being only matter of evidence, it need not be stamped. And as to the other objection, they answer, that the defendant's agreement is prior to the demise to the plaintiff; and that they could have proved that the plaintiff, at the time of the defendant's title, knew of the demise to him; and that the conveyance to him being a voluntary conveyance, he stands in the place of Lord *Abingdon*, and must be considered as a trustee for the defendant; and the court will not permit him to bring an ejectment against his *cestui que trust*. As to the question whether this is or is not a lease, we are all of opinion, that this is not a lease (a). The case in *Noy* (a) *Vide Cro.* 128, of *Sturgeon and Paynter*, is in point. In the *El.* 33. 486. present case, there is also an express stipulation that leases should be drawn before *Michaelmas*; therefore, it plainly was not the intention of the parties that such agreement should operate as a lease; but only that it should give the defendant a right to the immediate possession, 'till the lease could be drawn. Had it been a lease, and as such it was offered in evidence, we think that the determination was right, that it ought to be stamped. For as to the argument, that the word *lease* is inserted in the Stamp Act amongst other instruments, which are all specialties, and therefore that it shall not be intended that the legislature meant to include leases not by deed, we do not think any such intention can be inferred. The only object of the legislature was, to raise a revenue from certain things

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enumerated. There is no reason why one of the things should be charged rather than another. It is matter of mere positive institution; and, as it falls within the words, there is nothing in the nature of the thing to take it out of them. But if we thought that this had been a surprise upon the defendant, and that, by granting a new trial, we could enable the defendant to make use of this paper, as an equitable agreement, and to set it up as a valid objection, to preclude the plaintiff from bringing his ejectment, we perhaps should not refuse it.

The ground on which the defendant rests his title is this: it is said that the lessor of the plaintiff only represents Lord *Abingdon*, it being a voluntary conveyance, and is to be considered as a trustee for the defendant, and as such he shall not bring an ejectment against his own *cestui que trust*. If we were to decide that, it would be going a great deal further than has ever yet been done. The only cases, where this principle has been adopted, are, where the lessor of the plaintiff has been clearly and unequivocally a trustee for the defendant; and it would have been of course, for the court of Chancery to have decreed a conveyance to him. It is not necessary for us to say, what a court of Chancery might do in the present case. But thus much we may say, that it is not a mere voluntary conveyance to the lessor of the plaintiff. It is made to him as a trustee, for the benefit of creditors; and it is the same as if a mortgage had been made to any individual creditor, and he had brought the ejectment. In that case, it might perhaps be contended, that, as each party had an *equitable claim* upon Lord *Abingdon*, whoever first
got

got the legal title to the estate, ought not to be divested of it by a court of equity. But we do not mean to give any opinion as to this. It is enough for us to say, that this being at least a doubtful equity, which the defendant sets up against a legal title, this court, or a Judge at *Nisi Prius*, would not, and ought not, to interpose; and, therefore, it would be nugatory to send it down to a new trial.

Rule discharged.

On a motion for a new trial, Mr. Baron *Perryn*, before whom the cause was tried at the last assises at *Lancaster*, reported, that this was an action of trespass, for assaulting and beating the plaintiff's niece, *per quod servitium amisit*. The niece lived with her aunt in *Lancaster*, as her servant; her mother lived in a different part of the same county; and, by permission of the plaintiff, the niece went, in the month of *March* last, to see her mother; at which time the assault was made. The case proved on the part of the plaintiff, was aggravated with many circumstances of ill treatment, (which were particularly related in the detail of the evidence.) Another cause stood next in the paper for trial, which was brought by the niece against the same defendant, for the same assault. The counsel for the plaintiff declared their intention of not trying that cause, and withdrew the record. The defendant's counsel contended, that the jury could only give damages, in this cause, for the loss of service; the plaintiff's counsel insisted on the contrary. The learned Judge thought the aunt, in this case, stood in *loco parentis*; and as in actions brought by a father for deflowering his daughter, whereby he lost her service, large damages had been often given, he thought

Edmonson v. Machell, T. 27 Geo. III. B. R. Durnford and East, 2 V. 4. Where a new trial is moved for, on the ground of a mis-direction in point of law, if the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law.

this case bore an analogy to that, and that the jury, upon the whole of the case, had a right to give such damages as they thought just, considering the situation and circumstances of the defendant, who was proved to be a captain in the militia, the qualification for which was 300 l. a year. The jury, after consideration, found a verdict for the plaintiff, damages 300 l. with which the learned Judge declared himself not dissatisfied.

This application was made last term, on the ground of a mis-direction to the jury. The defendant's counsel denied that they had entered into any compromise, to permit the jury to take into consideration, in the measure of their damages, the injury which the niece herself had sustained, and which was the subject of the next action, in consideration of the plaintiff's counsel withdrawing the record in the next action. But it was admitted that the damages were not excessive, according to the evidence then given, if the jury could take both the actions into their consideration at once.

After a question put this day to the plaintiff's counsel, whether the niece would enter into a rule not to proceed in the action, in which she herself which was plaintiff, was answered in the affirmative,

ASHHURST, J. said, that the Judges of this court had consulted with the rest of the Judges on this case, and the result of their opinion was, without giving any positive opinion upon the question of law, that this rule ought to be discharged. An application for a new trial, is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer

the ends of justice. It does not require much penetration to see what are the ends of justice in the present case. It is certain that the girl herself ought to have some satisfaction for the injury she received; and as she consents not to try her action, the question is, whether justice has not already been done: for it was admitted at the bar, that, if the injury she sustained could be taken into consideration, in this action brought by the aunt, the damages which the jury have given are by no means excessive. Then there does not appear to be any ground for the defendant to call on the discretion of the court, to send this cause down to be re-tried, on a technical objection in point of law. And all the Judges are unanimously of opinion, that, as complete and substantial justice has been done, there is no reason to grant a new trial.

On the plaintiff's undertaking to pay over to the niece the damages, after deducting the costs of this action, and on the niece's undertaking not to proceed in the action in which she herself was plaintiff, rule discharged without costs.



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